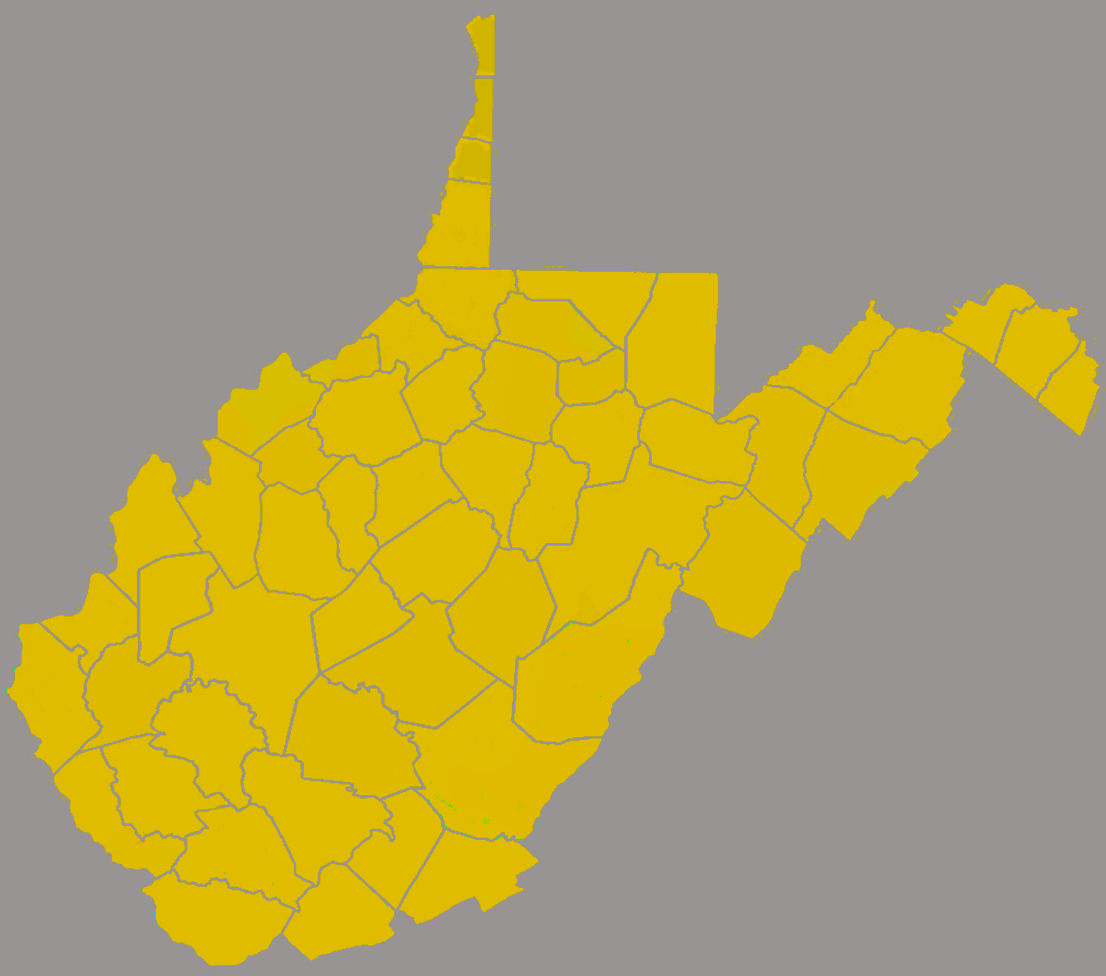
Attorney General

Patrick Morrisey's



17 Point Plan

"Promises Made, Promises Kept"

Attorney General PATRICK MORRISEY'S 17 POINT PLAN "PROMISES MADE, PROMISES KEPT"

Candidate Patrick Morrisey promised West Virginians that he would implement a wide-ranging 17-point plan to reform the Office of the Attorney General and advance key planks of his campaign platform during his first 100 days in office. With 100 days now officially behind him, Attorney General Morrisey is pleased to report on the progress of his plan and how, as a public officeholder, he has kept his promises to the citizens of West Virginia.

Attorney General Morrisey believes in accountability, which is why he issued the following progress report on the status of each of these initiatives. The following steps have been taken to implement Attorney General Patrick Morrisey's 17-point plan for the first 100 days in office.

Promise 1 - Eliminate Self-Promoting Trinkets: The Attorney General's Office will ban the use of trinkets bearing the Attorney General's name. This office isn't about using taxpayer resources for self-promotion. It's about putting the citizens of West Virginia first.

Actions Taken:

- ✓ On February 10, 2013, Attorney General Morrisey signed into effect his Trinket Policy (Policy # WVAGO-001), which generally prohibits the use of public funds for the purchase of self-promoting trinkets by the Office of the Attorney General. The Trinket Policy targets misuse of public funds by prohibiting the purchase of self-promoting trinkets unless the purchase is required by law or directly furthers the mission of the Office of the Attorney General. The policy strictly prohibits the use of the personal name or likeness of the Attorney General on any trinkets that must be purchased.
- ✓ In the spirit of further addressing the principles behind Morrisey's campaign promise to eliminate self-promoting trinkets, the Attorney General also issued two additional policies to:

✓ Limit the use of the Attorney General's name or likeness on many of the Office's consumer education materials (Policy # WVAGO-003); and,
✓ Prohibit the Attorney General's Office from using a state car in a parade.

Promise 2 - Send Settlement Monies Back to the State Legislature: Institute a policy to return future lawsuit settlement monies back to the State Legislature and the taxpayers.

Actions Taken:

✓ In January, the Attorney General's Office made significant changes to the language used in its settlement agreement forms so that all monies, outside of those funds necessary to recoup the cost of consumer protection outlays, are directed towards the West Virginia Legislature and taxpayers.
✓ Just two weeks into office, the Attorney General put the Office's new settlement language into effect as part of a $113 million multi-state settlement with Lender Processing Services, Inc.
✓ During the first 100 days, the Office of the Attorney General has secured hundreds of thousands of dollars in settlement monies. As part of the Office's new settlement policy, none of those settlement monies are being directed to pet causes.
✓ Attorney General Patrick Morrisey worked with the Governor and members of the West Virginia Legislature during his first 100 days in office on a landmark reform effort (S.B. 1005) to fundamentally change the process in which the Office of the Attorney General handles state settlement funds.
✓ Through his work with the Governor and members of the West Virginia Legislature, Attorney General Morrisey has facilitated the return of millions of dollars in state settlement funds to the Legislature from the Consumer Protection Recovery Fund, while also securing the funding necessary to continue providing a robust Division of Consumer Protection, Compliance & Enforcement.

Promise 3 - End Taxpayer-Funded Campaigns: Prohibit the use of broad-based office advertising for at least six months prior to an election.

Actions Taken:

✓ On February 10, 2013, Attorney General Morrisey signed into effect his Advertising Policy (Policy # WVAGO-002), which establishes significant guidelines limiting the use of the Attorney General's name or likeness in publicly funded advertisements.
✓ Pursuant to the Advertising Policy, the Attorney General's personal name or likeness ***shall not*** be used or placed on broad-based advertising if the advertising

falls during an election period - which is defined as the time period between the deadline for filing for Attorney General and the General Election.

✓ This policy actually goes further than Morrisey's campaign promise, and expands the ban on broad-based advertising from the close of the candidate filing period.

✓ The Attorney General also signed into effect on February 10th a policy regarding Constituent Education Materials (Policy # WVAGO-003) to ensure that public funds are spent only on broad-based Constituent Education Material if it directly furthers the mission or policy of the Office of Attorney General. The policy also prohibits the use of the Attorney General's name or likeness on such materials unless the inclusion is purely incidental.

Promise 4 - Use Competitive Bidding for Hiring Outside Counsel: Initiate a competitive bidding policy for how the Office of Attorney General hires outside counsel. When the State hires outside counsel, it should know that it is receiving high-quality services at reasonable prices. A competitive bidding system will reduce political influences and restore integrity to the Attorney General's office.

Actions Taken:

✓ On March 20, 2013, the Attorney General approved a draft Outside Counsel Policy (Policy # WVAGO-004) to establish the use of a competitive bidding process when outside counsel are appointed to represent the state.

✓ The Attorney General's draft policy requires a written determination prior to any appointment of outside counsel to ensure that such appointments are both cost-effective and in the interest of the public.

✓ Outside counsel must be appointed through a competitive bidding process, unless certain limited circumstances apply, that requires the application of several factors before any appointment can be made.

✓ The draft Outside Counsel Policy furthers accountability and transparency in outside counsel hires by requiring the Office of the Attorney General to maintain strict supervision and control of all legal matters involving outside counsel and to post all relevant outside counsel documents to the Attorney General's web site.

✓ The Attorney General has established a forty-five day period to seek public comment and practical input from the public, the Office's clients and the State. After review of public comment, the final Outside Counsel Policy for the Office of the Attorney General shall go into effect on July 16th.

Promise 5 - Commence Full-Scale Audit of Past Attorney General Office Expenditures: Commence a full-scale audit to examine past expenditures and current policies in place within the Office of Attorney General. Once the audit is complete, we will re-prioritize resources to areas that need them the most and ensure that all employees are acting in a manner consistent with the highest ethical standards.

Actions Taken:

✓ Shortly after taking office, Attorney General Morrisey and his staff began working with the West Virginia Legislative Auditor's Office on an audit of the Attorney General's Office.

✓ The Office of the Attorney General continues to work with the West Virginia Legislative Auditor's Office to determine whether past expenditures were spent appropriately and in accordance with court orders and state law.

✓ The Office is conducting its own exhaustive review of office policies and spending procedures to ensure that the Office of the Attorney General operates in a highly ethical manner moving forward.

✓ The audit process is ongoing. However, the Office has already instituted internal controls to refine the way certain expenditures are made.

Promise 6 - Collaborate with the Legislature to Enact Ethics Reforms: Work with the Legislature and Governor to ensure that the policies described under 1, 2, 3 and 4 are enacted by the Legislature. All future Attorneys General should abide by basic principles of ethics and the West Virginia Constitution.

Actions Taken:

✓ The Attorney General's Office worked closely with the Governor's Office and members of the Legislature to facilitate the introduction and passage of S.B. 1005, landmark reform legislation that returns millions of dollars of lawsuit settlement monies back to the Legislature and the taxpayers.

✓ The Attorney General's Office worked in collaboration with members of the House of Delegates on H.B. 3106, which would prohibit the use of public funds for self-promotional trinkets and broad-based advertisements.

✓ The Attorney General's draft Outside Counsel Policy was incorporated into proposed legislation (H.B. 3110) in the House of Delegates.

✓ The Office of the Attorney General worked with members of the House of Delegates to introduce a resolution (HJR 36) that would allow West Virginians to amend the state Constitution to limit any person serving as Attorney General to two consecutive terms.

✓ While not all of the proposed legislation passed, the Office of the Attorney General will continue working with lawmakers to ensure that all of these important measures are eventually passed into law.

Promise 7 - Take on the EPA: Review all existing lawsuits pending by Attorneys General and, after consultation with the Legislature and the Governor, determine which lawsuits against the federal government the State of West Virginia should join. The top priority will be focusing on Environmental Protection Agency (EPA) litigation.

Actions Taken:

✓ On February 11, 2013, Attorney General Morrisey sent a letter to President Barack Obama urging the President to take into account the interests of all Americans, including the people of West Virginia, when deciding whom to nominate as the new Environmental Protection Agency Administrator.

✓ In his letter to the President, Attorney General Morrisey informed President Obama that the Office of the West Virginia Attorney General would use every tool at its disposal to protect West Virginia's sovereign interests and fight federal overreach that harms the state's way of life.

✓ As part of Attorney General Morrisey's effort to identify potential environmental lawsuits affecting the state, the Office of the Attorney General has conducted an extensive review of all existing lawsuits brought by the states' attorneys general against the EPA, including, but not limited to the following:

- ✓ Lawsuits challenging the EPA's Endangerment Finding, Tailpipe Rule, and Timing & Tailoring Rule.
- ✓ Challenges to the EPA's "Cross-State Air Pollution Rule."

✓ The Office also has conducted an exhaustive docket search to identify other relevant environmental cases that may impact the state, and it has coordinated with officials in other states to identify any pending litigation in which West Virginia should participate.

✓ The Office of the Attorney General is working collaboratively with the West Virginia Department of Environmental Protection (WV DEP) regarding several matters that have a direct impact on the state's economy.

✓ The Attorney General's Office is currently drafting comments on several arbitrary aspects of an EPA-proposed rule that would invalidate certain West Virginia regulations concerning Startup, Shutdown, and Malfunction (SSM) regulations, and have a sweeping impact on West Virginia's energy resources.

✓ The Office of the Attorney General is working to ensure that arbitrary actions by the federal government do not derail the King Coal Highway - a vital economic development project in Southern West Virginia.

✓ Attorney General Morrisey is continuing to pursue litigation with several states and other interested parties challenging EPA air-emissions regulations that directly impact coal-fired power plants (*State of Michigan, et al v. Environmental Protection Agency,* Court of Appeals Docket # 12-1196). The regulations in question impose restrictive and unrealistic limits on emissions that could result in the closure of coal-fired power plants in West Virginia, Maryland, Ohio and Pennsylvania.
✓ Currently, the Office is working closely with WV DEP to provide legal assistance on a variety of regulatory matters to protect West Virginia's interests where it is potentially adverse to the federal government.
✓ The Attorney General's Office also is working with several states' attorneys general to ensure that the enormous potential for natural gas exploration in West Virginia and similarly situated states isn't negatively impacted by issues of federal overreach on the part of the EPA.

Promise 8 - Create an Office of Federalism & Freedom: Establish an Office of Federalism and Freedom to refocus some of the Office's priorities on challenging federal policies that have a tenuous nexus to law or the U.S. and West Virginia Constitutions.

Actions Taken:
✓ Attorney General Morrisey has initiated an informal working group of in-house attorneys, and is actively collaborating with other states' attorneys general, to take action on issues of federal overreach. Attorney General Morrisey decided to maintain this office in an informal manner, instead of creating a formal new department, so that he could save monies and utilize the Office's cross-cutting expertise on a variety of substantive issues relating to federal overreach.
✓ On top of fulfilling other daily responsibilities related to client demands and enforcement matters, the Office of the Attorney General has taken on a number of matters relating to federal overreach. Those matters include:
- ✓ Joining with seven other states in a lawsuit challenging the constitutionality of certain provisions of the Dodd-Frank Act.
- ✓ Joining with nineteen other states in filing a "friend of the court" brief in a case before the United States Supreme Court on the constitutionality of a New York statute that limits individual rights under the Second Amendment.
- ✓ Assisting the West Virginia Department of Environmental Protection on a variety of EPA-related issues that negatively impact West Virginia's economy.
- ✓ Actively reviewing environmental lawsuits for issues of federal overreach that may impact the state.
- ✓ Continuing to pursue a multi-state challenge of the Environmental Protection Agency's Utility MACT Rule -- which could result in the closure of coal-fired power plants in West Virginia -- in the United States Court of

Appeals for the District of Columbia. *State of Michigan, et al v. Environmental Protection Agency,* Court of Appeals Docket # 12-1196.

✓ Joining with twelve other states in a letter asking the U.S. Department of Health & Human Services to adopt broader religious exemptions to insurance mandates imposed pursuant to the Affordable Care Act.

✓ Scrutinizing additional healthcare and religious liberty lawsuits brought by states against the federal government within the arena of federal overreach.

✓ Working with other states to ensure that West Virginia's natural gas prospects aren't negatively impacted by issues of federal overreach on the part of the EPA.

Promise 9 - Hold a "Jobs Summit": Hold a "Jobs Summit" to identify any and all overreaching regulations that may impair business growth in the State of West Virginia. Since the Office of Attorney General possesses the legal power to play a significant role in the regulatory process, we should identify the regulations that are having the most negative impact on economic growth.

Actions Taken:

✓ On April 17, 2013, Attorney General Morrisey held his Jobs Summit kickoff event in the Lower Rotunda of the State Capitol.

✓ More than fifty people attended the Jobs Summit kickoff event, including elected officials, job providers, business organizations and members of the public at large.

✓ As part of the kickoff event, Attorney General Morrisey engaged in a question & answer session on a variety of issues related to the Jobs Summit & Listening Tour, and also discussed the Office of the Attorney General's plans for the concluding Jobs Summit Finale to take place later in the year.

✓ Attorney General Morrisey laid out the goals of the Jobs Summit & Listening Tour, which include:

- ✓ Identify and take steps to remove regulatory barriers that impeded job growth in the state.
- ✓ Increase private sector employment in the state.
- ✓ Attract new capital and investments to the state in order to foster vibrant manufacturing, service and construction sectors, to name just a few.
- ✓ Enhancing West Virginia's competitiveness when compared to surrounding states.
- ✓ Improve West Virginia's image to people and businesses located outside the state.

✓ Participants at the kickoff event included the West Virginia Chamber of Commerce, Associated Builders & Contractors - WV Chapter, West Virginia Coal

Association, and many others, who expressed their support of the goals of the Attorney General's Jobs Summit & Listening Tour.

✓ As part of the ongoing Jobs Summit & Listening Tour, Attorney General Morrisey will be traveling across the state to meet with stakeholders to discuss ways in which the Office of the Attorney General can help improve the state's business climate.

Promise 10 - Address Medicaid in a Meaningful Way: Work with the Governor and the Legislature to help address the budget shortfall facing the State's Medicaid Program. Through legal counseling, we will make recommendations about how the State can meet its financial challenges, while advancing new strategies to improve health care outcomes and lower health care costs for our State.

Actions Taken:

- ✓ Attorney General Patrick Morrisey has initiated substantive discussions with a number of senior state officials and members of the Legislature about how to improve the state's Medicaid Program.
- ✓ In these discussions, Attorney General Morrisey has outlined specific ideas about the legal mechanisms available to West Virginia to test innovative models to reduce Medicaid costs and enhance the quality of health care received by Medicaid beneficiaries.
- ✓ The Attorney General's Office has offered to help the West Virginia Department of Health & Human Resources (DHHR) submit several proposals to the Center for Medicare and Medicaid Innovation (CMMI) to test creative ways of improving West Virginia's Medicaid Program.
- ✓ Based upon his discussions with DHHR, Attorney General Morrisey will seek to establish a new memorandum of understanding with DHHR and its Inspector General to allow the Attorney General to pursue Medicaid fraud and abuse cases against small and medium-sized companies. The Attorney General's Office seeks to work collaboratively with the Inspector General's office to help eliminate fraud, waste and abuse wherever it exists.

Promise 11 - Crack Down on Medicaid Fraud: Crack down on Medicaid fraud by initiating a close review of Medicaid eligibility to ensure that precious government resources are being targeted to those who need it the most.

Actions Taken:

✓ Attorney General Morrisey held several meetings with the West Virginia Department of Health & Human Resources (DHHR) to discuss ways in which the Office of the Attorney General can work with WV DHHR and the Inspector General to ensure that Medicaid funding is spent appropriately.

✓ The Attorney General and staff have started working with members of WV DHHR on possible program integrity issues that would improve Medicaid fraud detection and prevention, including, but not limited to, benefit enrollment and eligibility issues.
✓ The Office of the Attorney General and WV DHHR also are looking at ways to collaborate on Medicaid fraud and control issues from a civil perspective, so that WV DHHR can better pursue low-dollar cases in state court.
✓ The Attorney General's Office will continue to work closely with WV DHHR on Medicaid fraud prevention issues that will hopefully save the state tens of millions of dollars in waste and abuse.

Promise 12 - Fight Prescription Drug Abuse: Request new prosecutorial authority from the Legislature to help pursue criminals who facilitate our prescription drug abuse problems in West Virginia. Prescription drug abuse cuts across county lines. As such, the Attorney General should play a far more proactive role coordinating prosecutions across the 55 counties.

Actions Taken:
✓ Attorney General Morrisey has initiated a dialogue with state lawmakers to discuss how additional prosecutorial powers would help the Office of the Attorney General tackle prescription drug abuse in West Virginia. The Attorney General has set forth several compelling reasons for such prosecutorial powers, which include the ability to coordinate the state's prosecutorial efforts related to prescription drugs.
✓ On March 11, 2013, Attorney General Morrisey joined with forty-seven other attorneys general in a letter encouraging the U.S. Food and Drug Administration to make generic pain pills harder to abuse. The letter highlighted the significant dangers of prescription drug abuse, and asked the U.S. Food and Drug Administration to take steps to ensure that generic drugs are designed with tamper-resistant features.
✓ The Office of the Attorney General is partnering with the Division of Protective Services to participate in the sixth National Prescription Drug Take-Back Day on April 27th at the State Capitol. The event, which is spearheaded by the federal Drug Enforcement Administration, allows for the safe collection and disposal of unused medication in an effort to prevent potential drug abuse.
✓ The Office of the Attorney General is currently investigating the role that various entities play in the prescription drug abuse epidemic and how West Virginia can better control the supply and demand side of this terrible problem.

Promise 13 - Prosecute Election Law Fraud: Request that the Legislature clarify the role of the Attorney General and the Secretary of State so that the Attorney General gains authority to prosecute violations of ethics and election law fraud and that the Attorney General plays a more proactive role in election law policy.

Actions Taken:

✓ On April 11, 2013, Attorney General Morrisey sent a letter to leadership in both the state Senate and House of Delegates requesting that the Legislature clarify the role that the Attorney General can play in helping the Secretary of State enforce state election laws.

✓ The Attorney General has established the position of Public Integrity Officer within the Office of the Attorney General to help collaborate with county prosecutors and other state entities on corruption and election fraud cases.

✓ The Office of the Attorney General has been asked to provide advice and assistance to the West Virginia Ethics Commission on several matters involving public officials.

Promise 14 - Educate West Virginians on Healthcare: Work with the Department of Health and Human Resources to conduct consumer education forums about the State's Medicaid Program, Medicare enrollment issues, and any other existing health care programs in place.

Actions Taken:

✓ On April 18, 2013, Attorney General Morrisey partnered with the West Virginia Department of Health and Human Resources (WV DHHR) to host the first in a series of telephone town hall meetings aimed at educating consumers and seniors on important issues regarding West Virginians' rights and responsibilities on healthcare matters.

✓Nearly 1,700 seniors participated in the Attorney General's telephone town hall event, in which the Attorney General and a representative from WV DHHR answered questions on a number of topics, including, but not limited to the following:

- ✓ Funding for Medicare and Medicaid Services;
- ✓ Prescription Drug Coverage under Medicare Part B;
- ✓ Subsidy Programs Available for West Virginians;
- ✓ Open-enrollment for Health Care Programs;

✓ Attorney General Morrisey and staff have also met with WV DHHR to discuss additional ways in which they can work together to better educate the public on important healthcare issues.

✓ The Attorney General's Office will be planning additional informational sessions in the upcoming months. As a separate matter, the Office will be sending letters soon to the Obama administration about the problems consumers are expected to see under the Affordable Care Act.

Promise 15 - Defend Second Amendment Rights: Accelerate state reciprocity agreements on concealed carry permits to advance our Second Amendment protections.

Actions Taken:

✓ S.B. 369 was passed by the Legislature on April 13, 2013, and is expected to be signed into law by the Governor. As a result of the bill's passage, the Office of the Attorney General is preparing to communicate with states in the coming weeks to seek additional reciprocity agreements.

✓Attorney General Morrisey's staff worked closely with the Legislature on S.B. 369, which will increase reciprocity rights for West Virginians and improve the ability of the Attorney General's Office to enter into future reciprocity agreements.

✓ On April 4, 2013, Attorney General Morrisey sent a letter to leadership in the House of Delegates encouraging action on S.B. 369. Attorney General Morrisey explained how the legislation would advance the Second Amendment protections afforded to all West Virginians by helping eliminate existing impediments to obtaining additional reciprocity agreements with other states.

✓ The Office of the Attorney General also has collaborated with the Legislature on other proposed legislation to ensure that existing reciprocity agreements aren't negatively impacted.

✓ The Attorney General's Office joined with nineteen other states in filing a "friend of the court" brief in a case before the United States Supreme Court on the constitutionality of a New York statute that limits individual rights under the Second Amendment.

Promise 16 - Join Religious Liberty Lawsuits: Place West Virginia on religious liberty lawsuits.

Actions Taken:

✓ The Office of the Attorney General has reviewed all pending lawsuits involving states relating to the contraceptive insurance mandate imposed pursuant to the Affordable Care Act.

✓ On March 26, 2013, Attorney General Morrisey joined with twelve other state attorneys general in asking the U.S. Department of Health & Human Services (HHS) to adopt broader religious exemptions to the contraceptive insurance mandate.

✓ The public comment from Attorney General Morrisey and twelve other attorneys general questions the failure of proposed federal amendments to sufficiently address faith and conscience-based objections and for entirely ignoring the concerns of for-profit business owners who object to providing insurance coverage for FDA-approved contraceptive methods and sterilization procedures, including the "morning-after pill" and the "week-after pill" as part of the Affordable Care Act.
✓ The Attorney General's Office will be working with other attorneys general in the near future to evaluate the response from HHS to public comment, and take appropriate action to ensure that West Virginians' religious liberty rights aren't infringed upon.
✓ The Attorney General's Office will evaluate any response from HHS to the state's comments before it determines how to proceed to see whether we can avoid litigation.

Promise 17 - Evaluate Potential Ethics Violations: After the audit referenced under number 5 is complete and all employees within the Office are interviewed, determine whether disciplinary action is warranted for any past behavior. We must ensure that all employees of the Office of Attorney General follow the rule of law and abide by the strictest ethical standards.

Actions Taken:
✓ Attorney General Morrisey is in the process of meeting with staff to examine any problematic activities that have occurred in the Office of the Attorney General, and has been cooperating with the West Virginia Legislative Auditor's Office to address past office issues as well.
✓ The Office of the Attorney General is conducting its own separate internal review, and will release any and all final conclusions after the completion of its review.
✓ The Office is currently awaiting additional findings of the audit, which will also be taken into consideration with respect to potential discipline.

Promise 1 - Eliminate Self-Promoting Trinkets

The Attorney General's Office will ban the use of trinkets bearing the Attorney General's name. This office isn't about using taxpayer resources for self-promotion. It's about putting the citizens of West Virginia first.

Actions Taken:

- ✓ On February 10, 2013, Attorney General Morrisey signed into effect his Trinket Policy (Policy # WVAGO-001), which generally prohibits the use of public funds for the purchase of self-promoting trinkets by the Office of the Attorney General. The Trinket Policy targets misuse of public funds by prohibiting the purchase of self-promoting trinkets unless the purchase is required by law or directly furthers the mission of the Office of the Attorney General. The policy strictly prohibits the use of the personal name or likeness of the Attorney General on any trinkets that must be purchased.
- ✓ In the spirit of further addressing the principles behind Morrisey's campaign promise to eliminate self-promoting trinkets, the Attorney General also issued two additional policies to:
    - ✓ Limit the use of the Attorney General's name or likeness on many of the Office's consumer education materials (Policy # WVAGO-003); and,
    - ✓ Prohibit the Attorney General's Office from using a state car in a parade.

WEST VIRGINIA OFFICE OF ATTORNEY GENERAL

TRINKET POLICY

I. Purpose

The purpose of this policy is to establish a guideline for the appropriate use and purchase of trinkets bearing the name of the Office of the Attorney General.

II. Overview

Given the growing abusive practice of elected public officials expending public monies to purchase trinkets emblazoned with their name, it shall be the policy of this office to eliminate such misuse of public funds, and to prohibit the placement of the personal name of the Attorney General on such items. It shall also be the policy of this office to limit the purchase of such items to those that are statutorily authorized or otherwise required by law, and/or to those that ***directly*** further the mission of the Office of the Attorney General.

III. Policy

A. No public funds may be expended for the purchase of trinkets unless it has been expressly approved by the Attorney General.
B. The use of public funds to purchase trinkets is generally prohibited and shall only be permitted when the expenditure of public monies is (1) statutorily authorized or otherwise required by law and/or (2) directly furthers the mission or policy of the Office of the Attorney General.
C. When the expenditure of public funds to purchase a trinket is permitted, the personal name or likeness of the Attorney General **shall not** be used or placed on the trinket.
D. Definitions-For purposes of this policy, the following definitions shall apply:
    i. *Trinket*- a small tangible item, ornament, or thing of trivial value, including, but not limited to, the following: pens, pencils, magnets, pill box holders, key-chains, nail files, matches, piggy banks, gun locks, and bags.
    ii. *Statutorily authorized*- a statute within the West Virginia Code or code of the United States of America that expressly provides or authorizes the Office of the Attorney General of West Virginia to perform a certain action.
    iii. *Otherwise required by law*- the Office of the Attorney General of West Virginia is directed to perform a certain action by order of Court, statute, or regulation.

E. For purposes of this policy, an expenditure of public funds to purchase a trinket is deemed to "directly further the mission or policy of the Office of Attorney General" if the primary and overriding purpose of the expenditure is to facilitate, promote, or enact a mission or policy of the office and there is a direct link between the item and the purpose of the expenditure.

F. Rule of Construction. By advancing this policy, the Office does not intend to include basic necessities of running an office under the prohibition. For example, items such as business cards, letterhead, envelopes, or other functional items where the inclusion of the officeholder's name is appropriate and is not being used to advance a wasteful purpose (or provide significant electoral value to the officeholder) are permitted. The goal of this policy is to eliminate abuse and save taxpayer monies, but not to eliminate basic functional tools of the office.

IV. References

A. West Virginia Code § 6B-2-5(b)

V. Effective Date: February 10, 2013

VI. Policy Number: WVAGO-001

Approved and Issued By:

/S/ PATRICK MORRISEY
Patrick Morrisey,
Attorney General of West Virginia

Date Signed: February 10, 2013.

The Herald-Dispatch

Attorney general sets bar higher on ethics

The "power of incumbency" is a bedrock reality in politics.

Once someone is elected to public office, they enjoy certain advantages when it comes to re-election. News coverage of their activities and public events give them name recognition. Assisting with funding or changes in law can help them build a base of support with voters and special interests.

Many officeholders also find clever ways to blend the activities of their office with self promotion. Some of this is rather subtle, and some is not.

THUMBS UP: Morrisey pledges to limit self promotion.

West Virginia's new Attorney General Patrick Morrisey made this a campaign issue last fall, and it appears he is going to do what he said he would do. At a press conference last week, Morrisey pledged to:

- Stop producing taxpayer-funded promotional trinkets such as key chains and magnets with his name on them.
- Stop running ads about the activities of the attorney general's office with his name or picture on them.
- Limit himself to two terms and propose a constitutional amendment to limit future attorneys general to two terms.

Although some residents may be unsure about the value of term limits, we think most agree that elected officials should not spend public tax dollars to blatantly promote themselves.

At this point, Morrisey's promise only applies to himself and the attorney general's office. But he is clearly setting the bar higher for other officeholders in West Virginia, and that is long overdue.

Promise 2 - Send Settlement Monies Back to the State Legislature

Institute a policy to return future lawsuit settlement monies back to the State Legislature and the taxpayers.

Actions Taken:

✓ In January, the Attorney General's Office made significant changes to the language used in its settlement agreement forms so that all monies, outside of those funds necessary to recoup the cost of consumer protection outlays, are directed towards the West Virginia Legislature and taxpayers.
✓ Just two weeks into office, the Attorney General put the Office's new settlement language into effect as part of a $113 million multi-state settlement with Lender Processing Services, Inc.
✓ During the first 100 days, the Office of the Attorney General has secured hundreds of thousands of dollars in settlement monies. As part of the Office's new settlement policy, none of those settlement monies are being directed to pet causes.
✓ Attorney General Patrick Morrisey worked with the Governor and members of the West Virginia Legislature during his first 100 days in office on a landmark reform effort (S.B. 1005) to fundamentally change the process in which the Office of the Attorney General handles state settlement funds.
✓ Through his work with the Governor and members of the West Virginia Legislature, Attorney General Morrisey has facilitated the return of millions of dollars in state settlement funds to the Legislature from the Consumer Protection Recovery Fund, while also securing the funding necessary to continue providing a robust Division of Consumer Protection, Compliance & Enforcement.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. PATRICK MORRISEY,
Attorney General,

Plaintiff,

CASE NO.: 13-C-916

v.

LENDER PROCESSING SERVICES, INC., a Delaware Corporation; **LPS DEFAULT SOLUTIONS, INC.**, a Delaware Corporation, and **DOCX, LLC**, a Georgia Limited Liability Company,

Defendants.
_____/

CONSENT FINAL JUDGMENT

This cause came on before the Court for entry of this Consent Final Judgment between Plaintiff, State of West Virginia ex rel. Patrick Morrisey, Attorney General ("Attorney General"), and Defendants Lender Processing Services, Inc., LPS Default Solutions, Inc., and DocX, LLC (hereinafter collectively referred to as "LPS" or "Defendants"), by and through their undersigned counsel, concerning the Attorney General's claims of violations of the West Virginia Consumer Credit and Protection Act. W. Va. Code § 46A-1-101 *et seq.* Therefore, upon consideration of the papers filed and consent of the parties hereto, it is hereby ORDERED and ADJUDGED as follows:

I. JURISDICTION

The parties agree that this Court has subject matter jurisdiction over this matter and jurisdiction over the parties and agree to the continuing jurisdiction of this Court over this matter and the parties. The Attorney General filed a Complaint against LPS pursuant to the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-I-101 *et seq.*

1.1 The Parties consent to and this Court has jurisdiction over the subject matter of this lawsuit and over all Parties. This Court retains jurisdiction of this Final Consent Judgment ("Judgment") and the Parties hereto for the purpose of enforcing and modifying this Judgment and for the purpose of granting such additional relief as may be necessary and appropriate.

1.2 The terms of this Judgment shall be governed by the laws of the State of West Virginia.

1.3 Entry of this Judgment is in the public interest and reflects a negotiated agreement among the Parties.

II. GENERAL PROVISIONS

2.1 **Agreement**

The Attorney General and LPS are represented by counsel and have agreed on a basis for settlement of the matters alleged in the Complaint. The parties agree to entry of this Judgment without the need for trial, discovery in this action, or adjudication of any issue of law or fact. Defendants enter into this Judgment freely and without coercion, and without admitting any violation of the law. Defendants acknowledge that they are able to abide by the provisions of this Judgment. Defendants further acknowledge that a violation of this Judgment may result in additional relief pursuant to State law.

2.2 **Definitions**

a. **"Attesting Documents"** shall mean affidavits and similar sworn statements making various assertions relating to a mortgage loan, such as the ownership of the mortgage note and mortgage or deed of trust, the amount of principal and interest due, and the fees and expenses chargeable to the borrower.

b. **"Covered Conduct"** shall mean LPS' practices related to mortgage default servicing, including document creation, preparation, execution, recordation, and notarization practices as they relate to Mortgage Loan Documents as well as LPS's relationships with attorneys representing the Servicers and other third parties through the Effective Date of this Judgment.

c. **"Effective Date"** shall mean the date on which a copy of this Judgment, duly executed by Defendants and by the Signatory Attorney General, is approved by and becomes a Judgment of the Court.

d. **"Federal Banking Agencies"** shall mean the Board of Governors of the Federal Reserve System, The Federal Deposit Insurance Corporation, The Office of the Comptroller of the Currency, and the Office of Thrift Supervision.

e. **"Investigating Attorneys General"** shall mean the Attorneys General of the States of Arizona, California, Connecticut, Florida, Illinois, Iowa, Oregon, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, and Washington.

f. **"LPS"** shall mean Defendants Lender Processing Services, Inc.; LPS Default Solutions, Inc.; and DocX, LLC, including all of their parents, subsidiaries, and divisions.

g. **"Mortgage Loan Documents"** shall mean (i) Attesting Documents; (ii) assignments of mortgages or deeds of trust or notes; (iii) mortgage or deed of trust lien releases and satisfactions; (iv) notices of trustee sale; (v) notices of breach or default; and (vi) other

mortgage-related documents that are required for statutory, non-judicial foreclosure or foreclosure-related documents filed with a state court or in connection with a federal bankruptcy proceeding.

h. "Parties" shall mean LPS and the Signatory Attorney General.

i. "Servicer" shall mean any residential mortgage loan servicing entity to which LPS provides technology and/or other services relating to mortgages in default.

j. "Signatory Attorney General" shall mean the Attorney General of West Virginia, or his/her authorized designee, who has agreed to this Judgment.

2.3 Stipulated Facts

The Investigating Attorneys General conducted investigations regarding certain business practices relating to the Covered Conduct. The Investigating Attorneys General found and the Defendants stipulate to the following facts of the investigation:

a. During a period from at least January 1, 2008, to December 31, 2010, certain Servicers authorized specific persons employed by certain subsidiaries of Lender Processing Services, Inc., to sign Mortgage Loan Documents or assist with the execution of Mortgage Loan Documents on their behalf.

b. Some Mortgage Loan Documents generated and/or executed by certain subsidiaries of Lender Processing Services, Inc., on behalf of Servicers contain defects including, but not limited to, unauthorized signatures, improper notarizations, or attestations of facts not personally known to or verified by the affiant. Some of these Mortgage Loan Documents may contain unauthorized signatures or may contain inaccurate information relating to the identity, location, or legal authority of the signatory, assignee, or beneficiary or to the effective date of the assignment.

c. Certain subsidiaries of Lender Processing Services, Inc., recorded or caused to be recorded Mortgage Loan Documents with these defects in local land records offices or executed or facilitated execution on behalf of the Servicers knowing some of these Mortgage Loan Documents would be filed in state courts or used to comply with statutory, non-judicial foreclosure processes.

d. At some time prior to November 1, 2009, employees and agents of DocX, LLC ("DocX") a wholly owned, indirect subsidiary of Lender Processing Services, Inc., were directed by management of DocX to initiate and implement a program under which some DocX employees signed Mortgage Loan Documents in the name of other DocX employees, who were or had been at one time authorized to sign on behalf of Servicers. DocX referred to these unauthorized signers as "Surrogate Signers."

e. At the time the Surrogate Signers signed certain Mortgage Loan Documents, they were not authorized by the applicable Servicer to sign their own names or the names of those persons who had purportedly been authorized by the Servicer to sign the Mortgage Loan Documents in question.

f. The Surrogate Signers executed certain Mortgage Loan Documents in the name of other DocX employees without indicating that the documents had been signed by a Surrogate Signer.

g. Notaries public employed by DocX or as agents of DocX completed the notarial statements on the Mortgage Loan Documents that were executed by Surrogate Signers and stated that those documents had been properly acknowledged, signed, and affirmed in their presence by the person whose name appeared on the document when in fact the Surrogate Signer had signed the name of another person or signed outside the presence of the notary, or both.

h. DocX presented and recorded certain Mortgage Loan Documents with local land records offices knowing they had been executed by Surrogate Signers.

i. On or around November 2009, Lender Processing Services, Inc., conducted an internal review of DocX and identified certain Mortgage Loan Documents that contained inaccuracies, unauthorized signatures, notarization defects, or other deficiencies. Lender Processing Services, Inc., has also identified certain other defects and deficiencies in the Mortgage Loan Documents executed by some of its other subsidiaries. Such past practices, when discovered by Lender Processing Services, Inc., management, were discontinued.

j. On April 13, 2011, LPS entered into a Consent Order with Federal Banking Agencies, which order contains similar allegations of deficiencies in Mortgage Loan Document execution practices at certain subsidiaries of LPS and management oversight of these practices. Pursuant to the Consent Order, LPS has agreed to take further remedial action, including, but not limited to, proposing a plan to enhance internal auditing and risk management, adopting a comprehensive compliance program for activities relating to default management services, and retaining an independent consultant to conduct an independent review of LPS' document execution services occurring between January 1, 2008, and December 31, 2010, to determine the existence and extent of the deficiencies and to assess LPS' ability to identify affected Mortgage Loan Documents, to remediate the deficiencies, as appropriate, and to assess whether any financial injury to Servicers or borrowers resulted from the document execution services described herein. To the extent the independent consultant identifies any such financial harm, LPS has agreed to prepare a remediation plan under the Consent Order that will, as appropriate, address reimbursement to those borrowers for any such financial injury.

2.4 **Preservation of Law Enforcement Action**

Nothing herein precludes the Signatory Attorney General from enforcing the provisions of this Judgment, or from pursuing any law enforcement action with respect to the acts or practices of the Defendants not covered by this Judgment or any acts or practices of the Defendants conducted after the entry of this Judgment. The fact that such conduct is not expressly prohibited by the terms of this Judgment shall not be a defense to any such enforcement action.

2.5 **Compliance with State and Federal Law**

Nothing herein relieves Defendants of their duty to comply with applicable laws of the State and all federal or local laws, regulations, ordinances, and codes, nor constitutes authorization by the Signatory Attorney General for the Defendants to engage in acts or practices prohibited by such laws. If, subsequent to the Effective Date of this Judgment, any state, local, or federal law is enacted or regulation promulgated with respect to the Covered Conduct of this Judgment and Defendants intend to comply with the newly enacted legislation or regulation and that compliance may create a conflict with the terms of this Judgment, Defendants shall notify the Signatory Attorney General of this intent. If the Attorney General agrees, the Attorney General shall consent to a modification for the purpose of eliminating the conflict. The Attorney General agrees that consent to modify is appropriate if any conduct prohibited by this Judgment is required by State, local, or federal law or regulation, or if conduct required by this Judgment is prohibited by such State, local, or federal law or regulation. The Attorney General will give each request to modify based on a change in the applicable law reasonable consideration and will respond to the Defendant(s) within 90 days. Nothing herein is intended to preclude Defendants from seeking modification of this Judgment if the Attorney General does not consent to the request of the Defendant(s).

2.6 Non-Approval of Conduct

Nothing herein constitutes approval by the Signatory Attorney General of LPS's past or future practices. LPS shall not make any representation to the contrary.

2.7 Release

The Signatory Attorney General hereby releases and discharges LPS and each and all current and former officers, shareholders, and employees from civil or administrative claims that his or her State has or may have had against them under W. Va. Code § 46A-1-101 *et seq.*, including claims for damages, fines, injunctive relief, remedies, sanctions, or penalties resulting from the Covered Conduct on or before the Effective Date (collectively, the "Released Claims").

Nothing herein shall be construed as a waiver or release of any private rights, causes of action, or remedies of any person against the Defendants with respect to the Covered Conduct.

2.8 Evidentiary Effect of this Judgment

This Judgment is not and shall not in any event be construed, deemed to be, and/or used as an admission or evidence of the validity of any claim that the Signatory Attorney General has or could assert against LPS, or an admission of any alleged wrongdoing or liability by LPS in any civil, criminal, or administrative court, administrative agency, or other tribunal anywhere in the country. The agreement of LPS to comply with the provisions of this Judgment is not an admission that LPS ever engaged in any activity contrary to any law. Moreover, by entering into this Judgment and agreeing to the terms and conditions provided herein, LPS does not intend to waive and does not waive any defenses, counterclaims, third party claims, privileges or immunities it may have in any other action or proceeding that has been or may be brought against it by any other State, Federal or local governmental agency, or any private litigant or class of litigants, arising from the practices described herein.

2.9 **Titles or headings**

The titles or headings to each section or provision of this Judgment are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of this Judgment.

2.10 **Modification of Terms**

No waiver, modification, or amendment of the terms of this Judgment shall be valid or binding unless made in writing, agreed to by both parties, and approved by this Court and then only to the extent specifically set forth in such written waiver, modification, or amendment.

2.11 **Severability of Terms**

If any clause, provision, or section of this Judgment shall, for any reason, be held illegal, invalid, or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision, or section of this Judgment, and this Judgment shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section, or other provision had not been contained herein.

2.12 **Time is of the Essence**

Time is of the essence with respect to each provision of this Judgment that requires action to be taken by LPS within a stated time period or upon a specified date or event.

2.13 **Execution in Counterparts**

This Judgment may be executed in any number of counterparts and by different signatories on separate counterparts, each of which shall constitute an original counterpart hereof and all of which together shall constitute one and the same document. One or more counterparts of this Judgment may be delivered by facsimile or electronic transmission with the intent that it or they shall constitute an original counterpart thereof.

2.14 No Acts to Circumvent Terms

LPS shall not participate directly or indirectly in any activity or form a separate entity or corporation for the purpose of engaging in acts or practices in whole or in part that are prohibited by this Judgment or for any other purpose that would otherwise circumvent any part of this Judgment.

2.15 More Favorable Terms.

In the event that LPS voluntarily enters into an agreement with the Attorney General of any state that is not participating in this Judgment ("non-participating Attorney General") to resolve potential claims relating to the Covered Conduct in this Judgment on terms that are different than those contained in this Judgment, exclusive of LPS' payment to a non-participating Attorney General of reasonable costs and attorneys' fees incurred by the non-participating Attorney General in civil litigation or criminal investigation that is active and pending as of November 29, 2012, then LPS shall provide a copy of such agreement to each Signatory Attorney General for review. If, after review, the Signatory Attorney General determines those alternative terms are materially more favorable than those contained in this Judgment, then LPS will join the Signatory Attorney General in petitioning the Court to amend this Judgment to reflect any such terms in place of terms herein, without waiving its rights to a judicial determination as to materiality.

III. PERMANENT INJUNCTIVE RELIEF AND COMPLIANCE

3.1 LPS, and any person acting under the actual direction or control of LPS, are hereby permanently restrained and enjoined from engaging in acts and practices prohibited by federal, state, or local law. Further, LPS, and any person acting under the actual direction or

control of LPS, are hereby permanently restrained and enjoined from engaging in the following acts and practices and shall comply with the following conduct requirements:

Document Execution

a. LPS shall not engage in, or authorize its employees to engage in, Surrogate Signing, as described in Section 2.3 herein.

b. LPS shall not execute any Attesting Document unless the affiant or signatory has personal knowledge of the accuracy and completeness of the assertions in the Attesting Document.

c. LPS shall ensure that any Mortgage Loan Document that is executed by LPS on behalf of a Servicer is executed pursuant to proper and verifiable authority to sign on behalf of the Servicer and that assertions contained in the Mortgage Loan Document are supported by competent and reliable evidence.

d. Any Mortgage Loan Document executed by LPS on behalf of a Servicer shall accurately identify the name of the signatory, the date on which the document is signed, and the authority upon which the signatory is executing the Mortgage Loan Document. If applicable or permissible, each Mortgage Loan Document shall include the name and address of the entity for which the signatory works.

e. LPS shall ensure that the affiant or signatory to any Attesting or Mortgage Loan Document shall sign by hand signature, except for permitted electronic filings.

f. LPS shall not notarize or cause to be notarized any Attesting or Mortgage Loan Document that is signed or attested to outside the presence of the notary.

g. If LPS provides any notary services or oversees the notarization of any Mortgage Loan Document, LPS shall ensure that the notary procedures comply with all applicable laws governing notarizations, including, but not limited to, ensuring that notaries verify the identity

and signature of the putative signatory. If LPS provides notary services or oversees the notarization of any Mortgage Loan Document, LPS shall ensure that notaries maintain notary logs that identify such Mortgage Loan Documents.

Law Firms

h. LPS shall not improperly interfere with the attorney-client relationship between attorneys and Servicers.

i. LPS shall not incentivize or promote attorney speed or volume to the detriment of accuracy.

j. If LPS provides technology or other services that assist law firms or their agents in handling issues relating to processing a foreclosure, bankruptcy, or other legal action, LPS will ensure that its technology and services do not impede, compromise, or otherwise interfere with the activities of a law firm providing legal services to its client.

k. LPS will ensure that foreclosure and bankruptcy counsel and foreclosure trustees to whom LPS provides services have an appropriate Servicer contact so they may communicate directly with the Servicer.

l. LPS shall not inhibit or otherwise discourage attorneys and Servicers from direct communication with each other.

m. LPS shall not negotiate any retainer agreements between the Servicer and its attorney(s) and LPS shall not be a party to such retainer agreements.

n. For those attorneys who are using LPS' technology services to access information from Servicers, LPS shall take no action to prevent legal counsel from having appropriate access to information from the Servicer's books and records to perform their duties in compliance with applicable laws.

Incentives

o. LPS shall not pay volume-based or other incentives to employees or other agents for the purpose of encouraging undue haste or lack of due diligence to the detriment of accuracy.

Third-Party Provider Oversight

p. LPS shall adopt policies and processes to oversee and manage agents, independent contractors, entities and third parties (including subsidiaries and affiliates) retained by LPS that provide foreclosure, bankruptcy or mortgage-servicing activities relating to default servicing (including loss mitigation) (collectively, such activities are "Servicing Activities" and such providers are "Third-Party Providers"), including the following:

(i). LPS shall perform appropriate due diligence of Third-Party Providers' qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability.

(ii). LPS shall ensure that all agreements, engagement letters, or oversight policies with Third-Party Providers comply with LPS' applicable policies and procedures (which will incorporate any applicable aspects of this Judgment) and applicable state and federal laws and rules.

(iii). LPS shall ensure that agreements, contracts or policies provide for adequate oversight, including measures to enforce Third-Party Provider contractual obligations, and to ensure timely action with respect to Third-Party Provider performance failures.

q. LPS shall conduct periodic reviews of Third-Party Providers. These reviews shall include the following:

(i). A review of the fees and costs assessed by the Third-Party Provider to ensure that such fees and costs are within the allowable fees authorized by the Servicers;

(ii). A review of the Third-Party Provider's processes to provide for compliance with LPS' policies and procedures concerning Servicing Activities;

(iii). A requirement in its agreements and contracts to require that the Third-Party Provider disclose to LPS any imposition of sanctions or professional disciplinary action taken against them for misconduct related to performance of Servicing Activities.

Fees

r. LPS shall require that all fees charged by Third-Party Providers for default, foreclosure, and bankruptcy-related services performed shall be within the allowable fees authorized by Servicers.

s. LPS shall be prohibited from collecting any unearned fee, or giving or accepting unlawful referral fees in relation to Third-Party Providers' default- or foreclosure-related services.

t. Other than reasonable fees charged by LPS to the Servicers for its oversight of Third-Party Providers, LPS shall not impose additional mark-ups or other fees on Third-Party Providers' default- or foreclosure-related services.

u. LPS' invoices to the Servicers shall label each fee or charge clearly and accurately to denote the specific product or service for which each fee or charge is attributed.

Escalation of Consumer Complaints

v. LPS shall provide to consumers, and ensure that its Third-Party Providers provide to consumers, reasonable notice of dedicated toll-free telephone numbers established and maintained by LPS that consumers can call concerning any issues related to document execution and field services activities (property inspection, preservation, maintenance, and winterization) LPS performs for Servicers. LPS shall have adequate and competent staff to answer and respond to consumer inquiries promptly, and LPS shall establish a process for dispute escalation and

direct contact with a Servicer at a number designated by such Servicer, and methods for tracking the resolution or escalation of complaints.

3.2 Compliance with Attorneys General Agreements with Servicers and other Applicable Laws

a. LPS shall be familiar with the settlement terms between the State Attorneys General and any Servicers, including those agreements and judgments already in force, such as the consent judgments entered by United States District Judge Rosemary Collyer of the United States District Court for the District of Columbia in case number 1:12-cv-00361-RMC, *United States et al. v. Bank of America et al*, ("hereinafter referred to as the "National Servicing Settlement") and, upon notification by an Attorney General, any agreements reached or judgments entered subsequent to the entry of this Judgment that affect LPS's acts or practices relating to the Covered Conduct of this Judgment.

b. LPS shall ensure that any services provided by LPS are consistent with the terms, conditions, and standards imposed by those agreements and judgments as well as with any applicable state or federal law.

c. LPS will commit appropriate resources to develop technology solutions which will support the National Servicing Settlement standards and guidelines. LPS will make these technology solutions available to its clients, including, without limitation, the following:

- Protections for Military Personnel under the Service members Civil Relief Act (SCRA);
- Document Integrity Solution that enables Servicers to ensure the accuracy and personal knowledge requirement for the execution of certain Mortgage Related Documents;

- Development of a technology process to avoid dual-tracking by enabling a Servicer to define certain steps or critical events to halt a foreclosure process during a loan modification program;
- Processes to enable Servicers to provide a single point of contact; and
- Enhanced loss mitigation processes.

For a two-year period from the Effective Date of this Judgment, LPS will provide a process for the Signatory Attorney General to audit LPS with respect to the development, functionality and implementation timelines for such technology solutions relating to the National Servicing Settlement. This audit process is in addition to and does not limit LPS's obligations under Section 3.2(e) herein.

d. LPS agrees to retain documents and other information reasonably sufficient to establish compliance with the provisions of this Judgment; however, nothing in this Judgment requires LPS to retain any specific document or other information for longer than five (5) years.

e. For a period of five (5) years from the Effective Date, upon a request from the Signatory Attorney General, LPS agrees to provide to the Signatory Attorney General's Office reasonable access to all non-privileged LPS documents and other information without the need for a subpoena or other compulsory process. The term "non-privileged" means any LPS document or other information not protected by the attorney-client or attorney work product privileges as defined by applicable state law. The term "reasonable access" reflects an understanding by LPS and the Signatory Attorney General's Office that LPS has a legal obligation to protect the privacy of personal identifying information of borrowers and to protect the trade secrets of LPS from public disclosure. LPS and the Signatory Attorneys General agree to work cooperatively to ensure compliance with these legal obligations. In the event that LPS concludes that specific information requested is not covered by this provision and cannot be

disclosed without a subpoena or other compulsory process, it will notify the Signatory Attorney General within ten (10) days that a subpoena for the information will be required.

This provision is intended to supplement and does not supplant or in any way restrict the Signatory Attorney General's subpoena power and investigative authority under state law.

Subject to the provisions above regarding non-privileged documents and other information, and legal obligations to protect the privacy of personal identifying information and trade secrets from public disclosure, LPS agrees to cooperate with any Signatory Attorney General in its investigation of non-parties related to Covered Conduct.

f. LPS shall ensure that if it is appointed to act as a trustee or successor trustee, LPS will meet all applicable state requirements to act as a trustee or successor trustee.

g. LPS shall appoint its Chief Compliance Officer Sheryl L. Newman, or another designee, to act as liaison to the Signatory Attorneys General to receive and respond to inquiries relating to this Judgment.

IV. REMEDIATION TO HOMEOWNERS

4.1 LPS agrees to identify Mortgage Loan Documents executed by LPS between January 1, 2008, and December 31, 2010, that may require remediation and to remediate those documents when LPS has the legal authority to do so and when reasonably necessary to assist any person or borrower or when required by state or local laws. If Mortgage Loan Documents executed by LPS prior to January 1, 2008, require remediation for compliance with applicable laws or when remediation of Mortgage Loan Documents executed by LPS prior to January 1, 2008, is reasonably necessary to assist any person or borrower, LPS shall remediate those documents when LPS has the legal authority to do so. Notwithstanding LPS's obligations pursuant to this paragraph, its obligations under Section 3.1(v) of this Judgment to address consumer inquiries with respect to document execution are not limited to documents executed

between January 1, 2008 and December 31, 2010. For twelve quarters immediately following entry of this judgment, LPS shall provide each Signatory Attorney General with quarterly reports detailing its efforts to fulfill its obligations under this paragraph.

V. MONETARY RELIEF

5.1 LPS shall pay a total of $203,595.00 as settlement payment to the Signatory Attorney General, within 10 (ten) days of the entry of this Judgment, and in accordance with the amounts of payments to each Signatory Attorney General set forth in the attached Exhibit A. At the discretion of the Signatory Attorney General, the payment shall be used by the Signatory Attorney General for any one or more of the following purposes: direct and indirect administrative, investigative, compliance, enforcement, or litigation costs and services incurred for consumer protection purposes; to be held for appropriation by the Legislature; and/or distribution to taxpayers and/or consumers. If any independent review or report by the Federal Banking Agencies determines that a greater number of documents might be affected than what was previously disclosed by Defendants, Defendants agree to notify the Signatory Attorney General within thirty (30) days and increase the payment to the State in accordance with the methodology used to calculate the State payment described in Exhibit A.

5.2 LPS shall pay to the Investigating Attorneys General a total of $7 million in additional attorney's fees and costs to be divided and paid by LPS to each Investigating Attorney General as designated by, and in the sole discretion of, the Investigating Attorneys General.

5.3 Satisfaction of the monetary obligations in this Section V shall not relieve any other obligations under other provisions of this Judgment.

VI. RIGHT TO REOPEN

6.1 If, upon motion of the Signatory Attorney General and after hearing by the Court, the Court finds that LPS failed to pay any amount pursuant to the terms provided by Section V or, subject to the provisions of Section VII of this Judgment, that LPS failed to comply with the provisions in Section II, III, or IV, the Court may enter judgment against LPS in favor of the Signatory Attorney General, in an amount to be determined by the Court, subject to statutory maximum penalties, which shall become immediately due and payable as civil penalties or, upon motion of the Attorney General, as any element of relief available pursuant to State law, less any amount previously paid. Should this Judgment be modified as to the monetary liability of Defendant, in all other respects, this Judgment shall remain in full force and effect, unless otherwise ordered by the Court.

6.2 Proceedings to reopen this case instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies as may be available by law, including any other proceedings that the Signatory Attorney General may initiate to enforce this Judgment.

VII. COMPLIANCE ENFORCEMENT

7.1 The Signatory Attorney General may assert any claim that LPS has violated this Judgment in a separate civil action to enforce compliance with this Judgment or may seek any other relief afforded by law, provided that the Signatory Attorney General gives LPS written notice of the alleged violation and affords LPS thirty (30) days from receipt of the notice to respond to and remedy the violation, or any other period as agreed to by the Signatory Attorney General and LPS. However, the Attorney General is not required to provide notice in advance of taking any enforcement action within his or her authority that the Attorney General believes is necessary to protect the health or safety of the public.

VIII. NOTICES

8.1 All notices under this Judgment shall be sent by overnight U.S. mail to the addresses below:

For the Plaintiff:

Office of the Attorney General
Deputy Attorney General
Consumer Protection and Antitrust Division
812 Quarrier Street
First Floor
Charleston, WV 25301

For the Defendants:

Todd C. Johnson, Executive Vice President and General Counsel
Lender Processing Services, Inc.
601 Riverside Avenue
Jacksonville, FL 32204

IX. RETENTION OF JURISDICTION

This Court shall retain jurisdiction over this matter for all purposes.

ORDERED AND ADJUDGED at Chs, *this* 4th *day of* February 2013.

Jennifer F. Bailey
Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 11
DAY OF February 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOINTLY APPROVED AND SUBMITTED FOR ENTRY:

For Plaintiff, State of West Virginia
ex rel. PATRICK MORRISEY,
ATTORNEY GENERAL

By: _____

Douglas L. Davis, WV Bar No. 5502
Office of the Attorney General of West Virginia
Consumer Protection/Antitrust Division
Post Office Box 1789
Charleston, West Virginia 25326-1789
Phone: (304) 558-8986

Date: 1-30-13

For Defendant **LENDER PROCESSING SERVICES, INC.:**

By: _____
Todd C. Johnson
Executive Vice President and General Counsel

Date: 1-29-13

For Defendant **LPS DEFAULT SOLUTIONS, INC.:**

By: _____
Todd C. Johnson
Executive Vice President and General Counsel

Date: 1-29-13

For Defendant **DOCX, LLC:**

By: _____
Todd C. Johnson
Executive Vice President and General Counsel

Date: 1-29-13

Counsel for Defendants

By: _____

David B. Thomas (WV Bar No. 3731)
Susan M. Robinson (WV Bar No. 5169)
THOMAS COMBS & SPANN, PLLC
300 Summers Street, Suite 1380
P.O. Box 3824
Charleston, WV 25338
Tel: (304) 414-1800

Date: 1.30.13

With copies to:

Melanie Ann Hines
BERGER SINGERMAN LLP
125 South Gadsden Street
Suite 300
Tallahassee, FL 32301
Telephone: (850) 561-3010
Facsimile: (850) 561-3013

Counsel to Lender Processing Services, Inc.,
LPS Default Solutions, Inc., and DocX, LLC

Bernard Nash
Christopher J. Allen
DICKSTEIN SHAPIRO LLP
1825 Eye Street, N.W.
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

Counsel to Lender Processing Services, Inc.,
LPS Default Solutions, Inc., and DocX, LLC

Exhibit A:

STATE	PAYMENT
Alabama	$1,039,780
Alaska	$79,786
Arizona	$3,288,621
Arkansas	$692,496
California	$35,592,284
Connecticut	$1,404,186
District of Columbia	$232,505
Florida	$7,659,176
Georgia	$4,137,490
Hawaii	$401,030
Idaho	$890,995
Illinois	$3,364,326
Indiana	$1,652,280
Iowa	$603,400
Kansas	$581,665
Kentucky	$948,906
Louisiana	$395,801
Maine	$515,725
Maryland	$2,993,130
Massachusetts	$1,539,580
Minnesota	$3,073,140
Mississippi	$507,115
Montana	$410,865
Nebraska	$820,190
New Hampshire	$457,961
New Jersey	$2,904,356
New Mexico	$671,531
New York	$1,883,826
North Carolina	$3,743,306
North Dakota	$219,961
Ohio	$2,544,990
Oklahoma	$930,020
Oregon	$2,513,875
Pennsylvania	$2,890,741
Rhode Island	$447,965
South Carolina	$1,830,640
South Dakota	$344,750
Tennessee	$2,335,746
Texas	$5,755,050
Utah	$1,390,326
Vermont	$371,000
Virginia	$3,558,821
Washington	$4,062,940
West Virginia	$203,595
Wisconsin	$1,505,315
Wyoming	$232,491
TOTAL	$113,623,678

The Parkersburg News and Sentinel

Bill a change in how the AG does business

April 19, 2013

Staff Report , Parkersburg News and Sentinel

CHARLESTON - A supplemental appropriation bill approved Thursday by the West Virginia Legislature is a landmark change on how the West Virginia attorney general will do business, the attorney general said.

The legislation established a precedent for how lawsuit settlement monies are managed and returns millions of dollars to the General Revenue Fund, Attorney General Pat Morrisey said.

Morrisey in the campaign against incumbent Democrat Darrell McGraw chided the former attorney general for refusing to turn over millions of dollars from settlements to the general fund.

"The passage of Senate Bill 1005 marks an important step for our state and the Attorney General's Office," Morrisey said. "I campaigned on a platform of returning lawsuit settlement monies back to the Legislature and the taxpayers and the promises made many months ago have been kept. This bill and its approval by members of the Legislature shows this is a new day in the Attorney General's office." SB 1005 was approved by the Senate on Wednesday and the House of Delegates on Thursday. He credited the governor and the House and Senate leadership.

It will result in $7.459 million of unencumbered funds in the Attorney General's Consumer Protection Recovery Fund going into the General Revenue Fund, Morrisey said. It then directs $3.5 million of that to the Department of Health and Human Resources' Consolidated Medical Service Fund for behavioral health programs, $1.6 million to the Higher Education Policy Commission and $500,000 to the Department of Commerce.

The remaining $1.859 million will be reappropriated to the Attorney General's office for personnel, technology improvements and operating expenses, Morrisey said.

With the agreement, a new policy for dealing with settlement monies was established, Morrisey said.

The Attorney General's office will have three years of operating monies to fund the Consumer Protection Division and pursue cases. Any monies that are brought into the office above the three-year operating allowance and not otherwise dedicated specifically for restitution for consumers that previously would have been spent at the discretion of the attorney general will be made available for the General Fund, Morrisey said.

"When I ran for this office, I said I did not want to act as a 'Super Legislature' by allocating state settlement money as I saw fit," Morrisey said. "I said I wanted to seek legislative appropriations for our accounts and return monies to consumers and taxpayers instead of using the office to dole monies out for pet projects. Through this agreement, I am living up to that promise and changing the way Charleston operates."

Promise 3 - End Taxpayer-Funded Campaigns

Prohibit the use of broad-based office advertising for at least six months prior to an election.

Actions Taken:

✓ On February 10, 2013, Attorney General Morrisey signed into effect his Advertising Policy (Policy # WVAGO-002), which establishes significant guidelines limiting the use of the Attorney General's name or likeness in publicly funded advertisements.
✓ Pursuant to the Advertising Policy, the Attorney General's personal name or likeness ***shall not*** be used or placed on broad-based advertising if the advertising falls during an election period - which is defined as the time period between the deadline for filing for Attorney General and the General Election.
✓ This policy actually goes further than Morrisey's campaign promise, and expands the ban on broad-based advertising from the close of the candidate filing period.
✓ The Attorney General also signed into effect on February 10th a policy regarding Constituent Education Materials (Policy # WVAGO-003) to ensure that public funds are spent only on broad-based Constituent Education Material if it directly furthers the mission or policy of the Office of Attorney General. The policy also prohibits the use of the Attorney General's name or likeness on such materials unless the inclusion is purely incidental.

WEST VIRGINIA OFFICE OF ATTORNEY GENERAL

ADVERTISING POLICY

I. Purpose

The purpose of this policy is to establish a guideline limiting the use of the Attorney General's personal name or likeness in publicly funded advertising during an election period.

II. Overview

Given the growing abusive practice of elected public officials expending public monies during an election season on radio, television, or other public advertising bearing the elected official's name, it shall be the policy of this Office to prohibit the personal name or likeness of the Attorney General on any publicly-funded broad-based advertising during an election period, unless the inclusion of such information is directed by law or Court order. In advancing this policy, it is not the intent of the Office of Attorney General to eliminate basic, functional tools to communicate to the public during an election year or engage in educational efforts. Rather, the office seeks to stop the abusive practices of using taxpayer monies to campaign for public office and maintaining inappropriate incumbency self-protection tools.

III. Policy

A. No public funds may be expended for public advertising unless it has been expressly approved by the Attorney General.

B. When the expenditure of public funds for public advertising is authorized, the personal name or likeness of the Attorney General **shall not** be used or placed on broad-based Public Advertising if the advertising falls during an election period, unless the Attorney General is directed by law to have such name or likeness included.

C. Definitions-For purposes of this policy, the following definitions shall apply:

   i. *Public Advertising*- radio, television, newspaper, billboards, signage, or other media intended to convey a message or information relating to the Office of the Attorney General. Dissemination of office press releases and information via email, social media, or other public relations tools for official purposes shall not be considered public advertising.

   ii. *Election Period*- the time period between the deadline for filing for Attorney General and the General Election.

iii. *Directed by Law*- the Office of the Attorney General is directed to include certain information by statute, State Rule, Order of Court, and/or federal regulation.

iv. *Broad-based*- communications on specific issues (other than regular responses to constituent requests or ongoing litigation or legal matters) designed to reach more than 50 people.

D. Rule of Construction/Interpretation. If the Attorney General must disseminate broad-based public information through public advertising during an election period, such advertising shall not reference the officeholder's name or likeness, unless there is an overwhelming public policy/consumer protection emergency or overriding legal reason to do so.

IV. References

A. West Virginia Code § 6B-2-5(b)

V. Effective Date: February 10, 2013

VI. Policy Number: WVAGO-002

Approved and Issued By:

/S/PATRICK MORRISEY
Patrick Morrisey,
Attorney General of West Virginia

Date Signed: February 10, 2013.

WEST VIRGINIA OFFICE OF ATTORNEY GENERAL

POLICY REGARDING CONSTITUENT EDUCATION MATERIALS

I. Purpose

The purpose of this policy is to prohibit the use of the Attorney General's name and likeness on broad-based Constituent Education Materials unless such inclusion is purely incidental.

II. Overview

The Office of Attorney General occasionally publishes and distributes educational materials relating to important legal issues within the purview of the Office. The intent of this educational material is to provide information to constituents, and not have these items used as thinly veiled campaign literature. Therefore, it shall be the policy of this Office to prohibit the inclusion of the Attorney General's personal name or likeness on broad-based Constituent Education Materials unless such inclusion is purely incidental. In effectuating this policy, it is not the intent of the Office of Attorney General to limit functional aspects of the office or the development of compliance tools that will assist the office's consumer protection responsibilities.

III. Policy

A. No public funds may be expended for the purchase and distribution of broad-based Constituent Education Material unless it has been expressly approved by the Attorney General.
B. Public funds may only be spent on broad-based Constituent Education Material if it directly furthers the mission or policy of the Office of Attorney General.
C. Subject to (E), when the expenditure of public funds to purchase broad-based Constituent Education Material is authorized, the personal name or likeness of the Attorney General **shall not** be placed or included on the material unless such inclusion is purely incidental.
D. Definitions-For purposes of this policy, the following definitions shall apply:
    i. *Broad-based Constituent Education Material*- brochures, booklets, handouts, guidelines, or other printed material intended to provide information to a broad audience of constituents pertaining to a legal issue, mission, or policy of the Office of Attorney General.
E. Rule of Reason/Construction – The policy is not intended to preclude the use of purely functional items or news releases that may include the officeholder's name or likeness (such as a news or opinion article referencing or written by the

officeholder) if the primary purpose of the material is for consumer education purposes or if the use of the officeholder's name is purely incidental.

F. For purposes of this policy, an expenditure of public funds to purchase broad-based Constituent Education Material is deemed to "directly further the mission or policy of the Office of Attorney General" if the primary and overriding purpose of the expenditure is to facilitate, promote, or enact a mission or policy of the office and there is a direct link between the material and the purpose of the expenditure.

IV. References

A. West Virginia Code § 6B-2-5(b)

V. Effective Date: February 10, 2013

VI. Policy Number: WVAGO-003

Approved and Issued By:

/S/ PATRICK MORRISEY
Patrick Morrisey,
Attorney General of West Virginia

Date Signed: February 10, 2013.

THE STATE JOURNAL

New AG Vows to End Self-Promotion at Public Expense

By ANDREA LANNOM
alannom@statejournal.com

In addition to minimizing the use of what he calls "trinkets," West Virginia Attorney General **Patrick Morrisey** on Feb. 11 announced many other ethics reforms he wants to see in the office.

"We were initially thinking about doing something creative with trinkets," Morrisey said in a news conference, referring to boxes of keychains and pillboxes on the conference desk.

"But we're not engaging in any shenanigans in trinkets. The inappropriate use of taxpayer money is not a laughing matter."

So what will happen to these trinkets?

Morrisey said his office will donate them to a charitable cause.

Morrisey said he wants to propose a constitutional amendment to limit the attorney general's terms to two four-year terms.

He also wants to change the policy for advertising.

"We are going further than any other state official in the country," he said, adding that he will not purchase trinkets with the office of the attorney general's name on it.

"We are dismantling the incumbent's self-protection tools. We are not going to allow the incumbent's self-protection tools to dominate West Virginia politics."

The advertising policy would ban the use of advertisements during an election year with Morrisey's name on them, he said.

"This goes further than any policy in the state," he said.

The use of his and his office's name would extend to constituent educational materials, Morrisey continued.

"This office, in the past, has disseminated office materials under the guise of consumer protection," he said. "This campaign literature will come to an end."

Morrisey said it is important to have educational material but the policy will be similar to that of the trinkets.

"Brochures will not have my name on it unless it is incidental in nature," he said. "I want to make it less about me as a person and more about serving the public."

So what does incidental in nature mean?

Well, he said his name will be on business cards, envelopes and press releases. He also said he will minimize the use of trinkets by using only functional items for the office.

"You just won't be seeing a TV ad with my likeness or name on it. I won't have a radio ad with my name on it," he said, later adding. "If I were to run for reelection ... there won't be any ads run during that election year with my name on it paid by taxpayers."

His next ethics item is to stop the use of public vehicles in a parade, he said.

Morrisey continued, saying he wants to ask the Legislature to prohibit conflicts of interests in distributing public money to private entities.

He said he will ask for a one-year prohibition "to prevent a state employee from performing compensated work or assuming employment with an entity over which that employee exercised authority with respect to conflicts or the awards of monies."

"We don't want self-dealing provisions," he said.

The last policy on which Morrisey focused was to regulate the use of outside counsel. He said he wants to move to a competitive bidding system.

"I've had requests to use outside counsel. In every instance, I talk to the client and say let's try to use inside counsel as well," he said. "There are a lot of good lawyers in our office, and we want to make sure they have the chance to do that work before engaging in hiring more expensive outside counsel."

Promise 4 - Use Competitive Bidding for Hiring Outside Counsel

Initiate a competitive bidding policy for how the Office of Attorney General hires outside counsel. When the State hires outside counsel, it should know that it is receiving high-quality services at reasonable prices. A competitive bidding system will reduce political influences and restore integrity to the Attorney General's office.

Actions Taken:

✓ On March 20, 2013, the Attorney General approved a draft Outside Counsel Policy (Policy # WVAGO-004) to establish the use of a competitive bidding process when outside counsel are appointed to represent the state.
✓ The Attorney General's draft policy requires a written determination prior to any appointment of outside counsel to ensure that such appointments are both cost-effective and in the interest of the public.
✓ Outside counsel must be appointed through a competitive bidding process, unless certain limited circumstances apply, that requires the application of several factors before any appointment can be made.
✓ The draft Outside Counsel Policy furthers accountability and transparency in outside counsel hires by requiring the Office of the Attorney General to maintain strict supervision and control of all legal matters involving outside counsel and to post all relevant outside counsel documents to the Attorney General's web site.
✓ The Attorney General has established a forty-five day period to seek public comment and practical input from the public, the Office's clients and the State. After review of public comment, the final Outside Counsel Policy for the Office of the Attorney General shall go into effect on July 16th.

WEST VIRGINIA OFFICE OF THE ATTORNEY GENERAL
OUTSIDE COUNSEL POLICY

I. Purpose

The purpose of this policy is to establish procedures and guidelines for the appointment of outside counsel to represent the State.

II. Overview

Given past questions surrounding the appointment of outside counsel by the West Virginia Attorney General's Office, it shall be the policy of this Office to use the competitive bidding process set forth herein for outside counsel hirings in order to maximize the value and benefit of providing legal counsel for state issues. It also shall be the policy of this Office to provide transparency and accountability in the appointment of all outside counsel hirings by emphasizing disclosure throughout the outside counsel hiring process. In advancing this policy, it is not the intent of the Office of Attorney General to preclude the provision of essential legal services. As such, any situation not contemplated by the policies and procedures set forth herein may be handled as appropriate by the Attorney General.

III. Policy

A. Appointment of Deputy & Assistant Attorneys General: The Attorney General may appoint such deputy or assistant attorneys general as may be necessary to properly perform the duties of the Office. All deputy or assistant attorneys general so appointed shall serve at the will and pleasure of the Attorney General and shall perform such duties as required of them.

B. Competitive Bidding Required for Appointment of Outside Counsel: When circumstances require the Attorney General to appoint private attorneys to represent the state, any such contracts for legal services shall be competitively bid in accordance with the provisions of this policy.

C. Written Determination Required for Appointment of Outside Counsel: The Attorney General may not enter into a contingency fee contract, or any other legal arrangement, with a private attorney unless the Attorney General makes a written determination prior to entering into such a contract that the legal representation is both cost-effective and in the interest of the public. Any written determination shall include specific findings for each of the following factors:

1. Whether sufficient and appropriate legal and financial resources exist within the Attorney General's office to handle the matter.
2. The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the legal services properly.

3. The geographic area where the attorney services are to be provided.
4. The amount of experience desired for the particular kind of legal services to be provided and the need for a private attorney's experience with similar issues or cases.

D. Requests for Proposal: If the Attorney General makes the determination described in subsection (C), the Attorney General shall request proposals from private attorneys to represent the State on a contingency-fee basis, or any other basis, unless the Attorney General makes a written determination that one of the following factors applies:

1. An emergency situation exists that requires time-sensitive legal services that cannot be adequately provided by the Office of Attorney General, and for which insufficient time exists to complete the customary competitive bidding process.
2. An appointment, or the continuation of an appointment, is necessary to avoid disruption in pending legal matters by allowing previously appointed outside counsel to continue providing legal representation.
3. The legal services will be most effectively handled by pre-approved attorneys who have already completed the bidding process referenced in subsection (G).

Any Requests for Proposal shall be posted to the web site of the Office of Attorney General. The time period under which the proposal is open should be clearly stated. Notice of the Request for Proposal may also be given to the West Virginia State Bar for broad distribution, or disseminated through other reasonable methods. The purpose of the Request for Proposal process is to ensure broad inclusion in the bidding process for a wide array of qualified firms.

E. Factors to be Considered During Competitive Bidding Process: When soliciting proposals from private attorneys to represent the State on a contingency-fee basis, or any other basis, the Attorney General shall consider the following factors when determining the most competitive proposal for legal services, and make a written determination as to the application of these factors, prior to entering into any contract for outside legal services:

1. Whether the private attorneys possess the requisite skills and expertise needed to handle the legal matters in question;
2. Whether the private attorneys possess requisite staffing and support to handle the scope of the litigation or matter;
3. Whether the private attorneys, or any members of the private attorneys' law firm, have been subject to reprimand by the West Virginia State Bar, or other entities, for unethical conduct;
4. Whether the private attorneys have been peer rated, and if so, what peer ratings they have received, along with any other recognitions or awards for legal services;
5. The estimated fees, costs and expenses of the private attorneys to perform the legal services requested;
6. The willingness of the private attorneys to enter into alternative billing arrangements;

7. Whether the private attorneys are in compliance with all applicable laws of the State of West Virginia; and,
8. Any such other relevant factors as may be identified by the Attorney General.

F. Solicitation of New Proposal Allowed: If, after soliciting proposals for legal services, the Attorney General determines that proposals received are insufficient based on an application of the factors set forth in subsection (E), the Attorney General may solicit additional proposals by issuing a new request for proposal pursuant to subsection (C),(D), and (E).

G. Pre-Bidding Process for Appointment of Outside Counsel: Understanding that time sensitive or emergency legal matters may arise that require the use of outside counsel, but do not allow sufficient time for completion of the competitive bidding process set forth herein, the Office of Attorney General envisions instituting a pre-bidding process for approving lawyers or law firms to perform legal work on behalf of the State in accordance with the following factors:

1. Private attorneys may be pre-approved to perform outside counsel work in specific areas of law provided that they have gone through a request for proposal and competitive bidding process as set forth in subsections (D) & (E) of this policy.
2. In instances in which more than one lawyer or law firm has been pre-approved for the provision of outside counsel legal services in an area of law, the Office of Attorney General shall perform an expedited, case-specific analysis using the factors set forth in subsection (E) to determine which lawyer or law firm would be better suited to represent the State on a particular legal matter.
3. The Office shall list any pre-approved attorneys by practice area on the Attorney General's web site.
4. Attorneys may be added to or deleted from the pre-approved list on a rolling basis, although it is the intent of the Attorney General's Office to regularly re-evaluate outside counsel relationships pursuant to the factors set forth herein.

H. Supervision & Control of Outside Counsel: The Office of Attorney General shall not enter into a contract for private legal services unless the following requirements are met throughout the contract period and any extensions thereof:

1. The Attorney General, or his designated employee(s) involved in the case, shall retain control over the course and conduct of the case.
2. The Attorney General, or his designated employee(s) with supervisory authority, shall be personally involved in overseeing the litigation.
3. The Attorney General, or his designated employee(s) involved in the case, shall retain veto power over any decisions made by outside counsel.
4. Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the Attorney General, his designated employee(s) and the State or other client entity.

I. Fee Limitations for Contingency Fee Contracts: The Office of Attorney General may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee in excess of:

1. Twenty-five percent of the first $10 million recovered; plus
2. Twenty percent of any portion of the recovery between $10 million and $15 million; plus
3. Fifteen percent of any portion of the recovery between $15 million and $20 million; plus
4. Ten percent of any portion of the recovery between $20 million and $25 million; plus
5. Five percent of any portion of the recovery exceeding $25 million.

In no event shall the aggregate contingency fee for any legal matter exceed $50 million, exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery. A contingency fee shall not be based on penalties or fines awarded or any amounts attributable to penalties or fines. The Attorney General's Office seeks to ensure that outside counsel performing work for the State agree to the terms outlined above.

J. Standard Addendum for Outside Counsel Contracts: The Attorney General shall develop a standard addendum to every contract for outside counsel attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the Attorney General's Office, including, without limitation, the requirements listed in (H)(1)-(4), inclusive.

K. Posting of Outside Counsel Determinations to Web Site: Subject to the provisions of subsection (M), the Attorney General's written determination to enter into a contingency fee contract, or any other legal contract, with a private attorney shall be posted on the Attorney General's website for public inspection within 15 business days after the date the contract is executed and shall remain posted on the website for the duration of the contract, including any extensions or amendments thereto. Any payment of contingency fees shall be posted on the Attorney General's website within 30 days after the payment of such fees to the private attorney and shall remain posted on the website for at least 365 days thereafter.

L. Document Retention and Time Record Requirements for Outside Counsel: Any private attorney under contract to provide legal services for the Attorney General shall, from the inception of the contract until at least four years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such legal services. In conjunction with the Attorney General's Office, the private attorney shall make all such records that are not covered by the attorney-client privilege or otherwise confidential in nature available for inspection and

copying upon request in accordance with the West Virginia Freedom of Information Act, WV Code § 29B-1-1, et seq.. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the matter for a period of at least four years, and shall promptly provide these records to the Attorney General upon request.

M. Confidentiality & Attorney Client Privilege: It is not the intent of the Attorney General's Office — in establishing new policies and procedures for the appointment of outside counsel — to put at risk any element of the attorney-client privilege or jeopardize confidential work product that allows attorneys to perform sensitive legal services on behalf of the State and the Office's clients. As such, the Attorney General retains the right to temporarily waive the disclosure requirements set forth in subsection (K) upon making a written determination that:

1. A waiver is necessary to protect attorney-client or privileged information; or,
2. Immediate disclosure of the existence of outside counsel, or any other sensitive information, could compromise the initiation, handling, or conclusion of any investigation or case matter handled by the Office of Attorney General.

Once any risks to the attorney-client privilege or confidential work product are no longer present, the Office of Attorney General shall make any and all suspended disclosures as soon as possible, and all subsequent disclosures in accordance with the time frame and manner set forth by subsection (K).

N. Application of Competitive Bidding Process to State Agencies: In recognition of the different needs, hiring procedures, and statutory authority of the various state agencies, it is the intent of the Attorney General's Office to implement these policies in an efficient and effective manner that does not impede the current legal representation of any state agencies. The Attorney General's Office will work accordingly with state agencies on a rolling basis in furtherance of the principles advanced herein until such time as the competitive bidding process can be implemented on a statewide basis.

O. Application of Competitive Bidding Process When Conflicts of Interest Occur: If the Attorney General's Office must recuse itself from any legal matter as a result of an apparent conflict of interest, and thus cannot implement in good faith the competitive bidding process as a result of the conflict, then the competitive bidding process set forth herein should be implemented, as best as possible, by the client State entity needing representation.

P. Coordination with Other States: It is not the intent of the Office of Attorney General to adversely impact the State's legal interests by prohibiting or otherwise impairing the ability of the State or its entities to coordinate with other states or state entities. Accordingly, the Attorney General may agree to the use of counsel, irrespective of the policies herein, when

it is in the best interest of the State or its entities to join or participate with a group of states or state entities that intend to be or are already represented by outside counsel, and the retention of separate legal counsel for the State or its entities would inhibit the ability to join or participate in that matter. This section covers, for example, lawsuits brought jointly by multiple states represented by the same law firm or firms to challenge federal laws or regulations.

IV. **Effective Date:** The Office of Attorney General will begin the process of implementing this draft policy for new matters on April 15th while also allowing for a forty-five day period to seek public comment and practical input from the Office's clients and the State. In order to ensure adequate time for review of public comment, the final outside counsel policy for the Office of Attorney General shall go into effect on July 16th, and will fully apply to any and all legal matters filed after that date.

V. **Policy Number:** WVAGO-004

Approved and Issued By:

Patrick Morrisey

PATRICK MORRISEY
Attorney General of West Virginia

Date Signed: 3-20-13

The Journal
[WWW.JOURNAL-NEWS.NET]

Changing Business

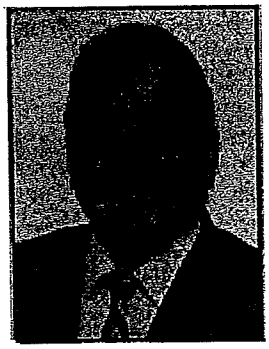
Morrisey plans to post contracts for seeking outside legal counsel

By Rachel Molenda
JOURNAL STAFF WRITER

CHARLESTON — The West Virginia Office of Attorney General announced Thursday guidelines for doing business with attorneys outside its office.

The policy would create a series of factors in order to determine whether or not the WVAG office would seek outside counsel, such as whether or not there are sufficient legal and financial resources in the office to handle the case, the amount of experience needed to provide legal services and the geographic area of the case.

If it is found that outside counsel is needed for a case, private attorneys can submit proposals to represent the state on a contingency-fee basis. This means outside counsel will be paid a certain percentage based on the outcome of the lawsuit. The contingency fees will not exceed $50 million, according to the policy.



"We believe the public deserves to know who is getting paid by the state of West Virginia."
Patrick Morrisey
Attorney General

Attorney General Patrick Morrisey plans to post each outside counsel contract on the WVAG website for the length of the agreement, as well as any payment of contingency fees.

"We believe the public deserves to know who is getting paid by the state of West Virginia," Morrisey said Thursday in a telephone interview.

Morrisey said this new policy "takes aim at the good old boy network" of assigning outside counsel in West Virginia, a frequent criticism of his predecessor, Daryl McGraw, that Morrisey has expressed since his 2012 campaign for office.

"(This policy) gives every firm opportunity to make their case as to why they're qualified to work for the state," Morrisey said.

Morrisey recently faced criticism from lawmakers regarding his decision to hire Washington, D.C. Attorney Elbert Lin as solicitor general, though he is not yet licensed to practice law in the state.

Morrisey defended his decision and said the process for getting licensed to practice law in West Virginia is nothing new for attorneys moving into the state. Morissey called the critiques "silly," and cited Lin's legal experience as the reason for his hiring.

"We were very fortunate that we were able to recruit a first-round draft pick to come to the state of West Virginia," Morrisey said, adding that internal legal talent would cost the office less than hiring outside counsel to compensate.

See COUNSEL A2

Counsel From Page A1

While implementation of this policy is set to begin April 15, there will be a 45-day period to allow for public comment, as well as input from clients and the state, according to a press release issued by the WVAG office.

A copy of the outside counsel policy is available at www.wvago.gov/outside-counsel.cfm. Written comments on the policy may be emailed to the Office of the Attorney General at or mailed to: West Virginia Attorney General's Office, Attn: Outside Counsel Policy, West Virginia State Capitol, Building 1, Room 26-E, Charleston, WV 25303. All comments must be received by May 30.

— *Staff writer Rachel Molenda can be reached at 304-263-8931, ext. 215, or rmolenda@journal-news.net.*

The Herald-Dispatch

Morrisey outlines process for hiring private counsel

The Associated Press

CHARLESTON — West Virginia Attorney General Patrick Morrisey has outlined specific protocols and guidelines for when and how his office will contract with private lawyers.

During last fall's campaign, Morrisey consistently criticized his predecessor's use of outside counsel. Former Attorney General Darrell McGraw frequently hired outside lawyers for major cases, arguing they provided needed expertise.

Under the guidelines, Morrisey's office will provide written requests whenever it wishes to hire outside counsel. The office will outline why outside counsel is needed, how much time and labor will be required and then open the request to competitive bidding.

Two of the seven factors considered when reviewing bids will be cost related.

The new guidelines will be open for public comment starting on April 15, and are expected to go into effect in July.

Promise 5 - Commence Full-Scale Audit of Past Attorney General Office Expenditures

Commence a full-scale audit to examine past expenditures and current policies in place within the Office of Attorney General. Once the audit is complete, we will re-prioritize resources to areas that need them the most and ensure that all employees are acting in a manner consistent with the highest ethical standards.

Actions Taken:

✓ Shortly after taking office, Attorney General Morrisey and his staff began working with the West Virginia Legislative Auditor's Office on an audit of the Attorney General's Office.
✓ The Office of the Attorney General continues to work with the West Virginia Legislative Auditor's Office to determine whether past expenditures were spent appropriately and in accordance with court orders and state law.
✓ The Office is conducting its own exhaustive review of office policies and spending procedures to ensure that the Office of the Attorney General operates in a highly ethical manner moving forward.
✓ The audit process is ongoing. However, the Office has already instituted internal controls to refine the way certain expenditures are made.

Promise 6 - Collaborate with the Legislature to Enact Ethics Reforms

Work with the Legislature and Governor to ensure that the policies described under 1, 2, 3 and 4 are enacted by the Legislature. All future Attorneys General should abide by basic principles of ethics and the West Virginia Constitution.

Actions Taken:

✓ The Attorney General's Office worked closely with the Governor's Office and members of the Legislature to facilitate the introduction and passage of S.B. 1005, landmark reform legislation that returns millions of dollars of lawsuit settlement monies back to the Legislature and the taxpayers.
✓ The Attorney General's Office worked in collaboration with members of the House of Delegates on H.B. 3106, which would prohibit the use of public funds for self-promotional trinkets and broad-based advertisements.
✓ The Attorney General's draft Outside Counsel Policy was incorporated into proposed legislation (H.B. 3110) in the House of Delegates.
✓ The Office of the Attorney General worked with members of the House of Delegates to introduce a resolution (HJR 36) that would allow West Virginians to amend the state Constitution to limit any person serving as Attorney General to two consecutive terms.
✓ While not all of the proposed legislation passed, the Office of the Attorney General will continue working with lawmakers to ensure that all of these important measures are eventually passed into law.

ENROLLED

Senate Bill No. 1005

(BY SENATORS KESSLER (MR. PRESIDENT) AND M. HALL,
BY REQUEST OF THE EXECUTIVE)

[Passed April 18, 2013; in effect from passage.]

AN ACT expiring funds to the unappropriated surplus balance in the State Fund, General Revenue, for the fiscal year ending June 30, 2013, in the amount of $10,317,860.71 from the Governor's Office - Civil Contingent Fund, fund 0105, fiscal year 2009, organization 0100, activity 236, and in the amount of $7,459,913 from the Attorney General, Consumer Protection Recovery Fund, fund 1509, fiscal year 2013, organization 1500, and making a supplementary appropriation of public moneys out of the Treasury from the balance of moneys remaining as an unappropriated surplus balance in the State Fund, General Revenue, to the Governor's Office - Civil Contingent Fund, fund 0105, fiscal year 2013, organization 0100, to the Attorney General, fund 0150, fiscal year 2013, organization 1500, to the Department of Commerce, West Virginia Development Office, fund 0256, fiscal year 2013, organization 0307, to the Department of Health and Human Resources, Consolidated Medical Service Fund, fund 0525, fiscal year 2013, organization 0506, to the Higher Education Policy Commission - Administration - Control Account, fund 0589, fiscal year 2013, organization 0441, and to the Higher Education Policy Commission - System - Control Account, fund 0586, fiscal year 2013, organization 0442, by supplementing and amending the appropriations for the fiscal year ending June 30, 2013.

WHEREAS, The Governor finds that the account balances in the Governor's Office - Civil Contingent Fund, fund 0105, fiscal year 2009, organization 0100, activity 236, and in the Attorney General, Consumer Protection Recovery Fund, fund 1509, fiscal year 2013, organization 1500, exceed that which is necessary for the purposes for which the accounts were established; and

WHEREAS, The Governor submitted to the Legislature the Executive Budget document, dated February 13, 2013, which included a statement of the State Fund, General Revenue, setting forth therein the cash balance as of July 1, 2012, and further included the estimate of revenues for the fiscal year 2013, less net appropriation balances forwarded and regular appropriations for the fiscal year 2013; and

WHEREAS, It appears from the Governor's Executive Budget document, statement of the State Fund, General Revenue, and this legislation, there now remains an unappropriated surplus balance in the State Treasury which is available for appropriation during the fiscal year ending June 30, 2013; therefore

Be it enacted by the Legislature of West Virginia:

That the balance of the funds available for expenditure in the fiscal year ending June 30, 2013, in the Governor's Office - Civil Contingent Fund, fund 0105, fiscal year 2009, organization 0100, activity 236, be decreased by expiring the amount of $10,317,860.71, and in the Attorney General, Consumer Protection Recovery Fund, fund 1509, fiscal year 2013, organization 1500, be decreased by expiring the amount of $7,459,913, all to the unappropriated surplus balance of the State Fund, General Revenue, to be available for appropriation during the fiscal year ending June 30, 2013.

And, That the total appropriation for the fiscal year ending June 30, 2013, to fund 0105, fiscal year 2013, organization 0100, be

supplemented and amended by adding a new item of appropriation as follows:

TITLE II – APPROPRIATIONS.

Section 1. Appropriations from General Revenue.

EXECUTIVE

7-Governor's Office –
Civil Contingent Fund

(WV Code Chapter 5)

Fund 0105 FY 2013 Org 0100

		Act-ivity	General Revenue Fund
1b	Natural Disasters - Surplus (R). .	764	$ 10,317,860

Any federal reimbursements received to remunerate disbursement from this activity or funds transferred from this activity shall be credited back to this activity.

Any unexpended balance remaining in the above appropriation for Natural Disasters - Surplus (fund 0105, activity 764) at the close of the fiscal year 2013 is hereby reappropriated for expenditure during the fiscal year 2014.

And, That the total appropriation for the fiscal year ending June 30, 2013, to fund 0150, fiscal year 2013, organization 1500, be supplemented and amended by increasing existing items and adding new items of appropriation as follows:

TITLE II – APPROPRIATIONS.

Section 1. Appropriations from General Revenue.

EXECUTIVE

15-Attorney General

(WV Code Chapter 5, 14, 46A and 47)

Fund 0150 FY 2013 Org 1500

			Act-ivity		General Revenue Fund
1		Personal Services - Surplus.....	243	$	309,000
4		Employee Benefits - Surplus....	250		115,425
8		Equipment - Surplus	341		260,200
10a		Technology Improvements -			
10b		Surplus (R)	725		965,020
11a		Operating Expenses -			
		Surplus (R).....	779		210,268

Any unexpended balance remaining in the above appropriation for Equipment - Surplus (fund 0150, activity 341), Technology Improvements - Surplus (fund 0150, activity 725), and Operating Expenses - Surplus (fund 0150, activity 779) at the close of the fiscal year 2013 is hereby reappropriated for expenditure during the fiscal year 2014.

And, That the total appropriation for the fiscal year ending June 30, 2013, to fund 256, fiscal year 2013, organization 0307, be supplemented and amended by adding a new item of appropriation as follows:

TITLE II – APPROPRIATIONS.

Section 1. Appropriations from General Revenue.

DEPARTMENT OF COMMERCE

36-West Virginia Development Office

(WV Code Chapter 5B)

Fund 0256 FY 2013 Org 0307

		Act-ivity	General Revenue Fund
21a	Unclassified-Transfer-Surplus. . .	382	$ 1,000,000

The above appropriation for Unclassified - Transfer - Surplus (fund 0256, activity 382) shall be transferred to the West Virginia Affordable Housing Trust Fund as established under §31-18D.

And, That the total appropriation for the fiscal year ending June 30, 2013, to fund 0525, fiscal year 2013, organization 0506, be supplemented and amended by increasing an existing item of appropriation as follows:

TITLE II –APPROPRIATIONS.

Section 1. Appropriations from General Revenue.

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

64-Consolidated Medical Service Fund

(WV Code Chapter 16)

Fund 0525 FY 2013 Org 0506

			Activity	General Revenue Fund
6	Behavioral Health Program -			
6a	Surplus (R)		631	$ 3,000,000

Any unexpended balance remaining in the above appropriation for Behavioral Health Program - Surplus (fund 0525, activity 631) at the close of the fiscal year 2013 is hereby reappropriated for expenditure during the fiscal year 2014.

And, That the total appropriation for the fiscal year ending June 30, 2013, to fund 0589, fiscal year 2013, organization 0441, be supplemented and amended by adding a new item of appropriation as follows:

TITLE II – APPROPRIATIONS.

Section 1. Appropriations from General Revenue.

HIGHER EDUCATION

93-Higher Education Policy Commission - Administration Control Account

(WV Code Chapter 18B)

Fund 0589 FY 2013 Org 0441

		Act-ivity	General Revenue Fund
10a	Educational Enhancements -		
10b	Surplus (R).....	927	$ 1,000,000

Any unexpended balance remaining in the above appropriation for Educational Enhancement - Surplus (fund 0589, activity 927) at the close of the fiscal year 2013 is hereby reappropriated for expenditure during the fiscal year 2014.

The above appropriation for Educational Enhancements - Surplus (fund 0589, activity 927) is to be distributed evenly between the West Virginia University School of Pharmacy and the Marshall University School of Pharmacy to provide scholarships to pharmacy students.

And, That the total appropriation for the fiscal year ending June 30, 2013, to fund 0586, fiscal year 2013, organization 0442, be supplemented and amended by increasing existing items of appropriation as follows:

TITLE II – APPROPRIATIONS.

Section 1. Appropriations from General Revenue.

HIGHER EDUCATION

94-Higher Education Policy Commission - System - Control Account

(WV Code Chapter 18B)

Fund 0586 FY 2013 Org 0442

		Act-ivity	General Revenue Funds
2a	Unclassified - Surplus	097	$ 250,000
6	WVU - School of Health		
6a	Sciences - Surplus (R)	713	350,000

Any unexpended balance remaining in the above appropriation for WVU-School of Health Sciences - Surplus (fund 0586, activity 713) at the close of the fiscal year 2013 is hereby reappropriated for expenditure during the fiscal year 2014.

From the above appropriation for Unclassified - Surplus (fund 0586, activity 097) $250,000 is for West Virginia State University Land Grant Match.

The purpose of this bill is to expire funds into the unappropriated surplus balance in the State Fund, General Revenue, and to supplement, amend, increase existing items and add new items of appropriation in the aforesaid accounts for the designated spending units for expenditure during the fiscal year 2013.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

.....
Clerk of the Senate

.....
Clerk of the House of Delegates

.....
President of the Senate

.....
Speaker of the House of Delegates

The within ..... this the .....

Day of ....., 2013.

.....
Governor

H. B. 3106

(By Delegates Armstead, Cowles, Lane, Sobonya, Ellem, Reynolds, Anderson and Raines)

(By Request of the Attorney General)

[Introduced March 25, 2013; referred to the Committee on the Judiciary then Finance.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §5-3-6, relating to prohibiting the Attorney General from placing his or her name or likeness on trinkets purchased with public moneys, and on public advertising purchased with public moneys during an election period.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §5-3-6, to read as follows:

ARTICLE 3. ATTORNEY GENERAL.

§5-3-6. Use of public funds for self-promotion.

(a)(1) The Attorney General may not knowingly and intentionally place or allow the use of his or her personal name or likeness to be placed on a trinket that is purchased with public moneys or distributed by the Office of the Attorney General.

(2) Subdivision (1) of this subsection does not prohibit incidental office items such as business cards, letterhead, envelopes, door signs or plates or other office insignia where the inclusion of the Attorney General's name is appropriate.

(b) During any election period in which he or she is a candidate, the Attorney General may not knowingly and intentionally place or allow the use of his or her personal name or likeness to be placed on any broad-based public advertising paid for with public moneys or distributed on behalf of a public entity, unless the Attorney General is directed by law to have his or her name or likeness included.

(c) As used in this section:

(1) "Broad-based" means communications on specific issues, other than regular responses to constituent requests or ongoing litigation or legal matters, designed to reach more than fifty people at one time.

(2) "Directed by law" means the Office of the Attorney General is directed to include certain information by statute, state rule, order of court or federal regulation.

(3) "Election period" means the time period between the deadline for filing for Attorney General and the general election.

(4) "Public advertising" means radio, television, newspaper, billboards, signs or other media intended to convey a message or information relating to the Office of the Attorney General.

Dissemination of office press releases and information via e-mail, social media, or other public relations tools for official purposes is not public advertising.

(5) "Trinket" means a small tangible item, ornament or thing of trivial value, including, but not limited to, pens, pencils, magnets, pill box holders, key-chains, nail files, matches, piggy banks, gun locks and bags.

NOTE: The purpose of this bill is to prohibit the Attorney General from placing his or her name or likeness on trinkets purchased with public moneys, and on public advertising purchased with public moneys during an election period.

This section is new; therefore, it has been completely underscored.

H. B. 3110

(By Delegate Armstead)

[Introduced March 25, 2013; referred to the Committee on the Judiciary then Finance.]

A BILL to amend and reenact §5-3-3 and §5-3-4 of the Code of West Virginia, 1931, as amended, all relating to clarifying the powers of the Attorney General to enter into contracts for legal services with attorneys outside the Attorney General's Office.

Be it enacted by the Legislature of West Virginia:

That §5-3-3 and §5-3-4 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 3. ATTORNEY GENERAL.

§5-3-3. Assistants to Attorney General.

(a) The following terms, wherever used or referred to in this section, have the following meanings:

(1) "Deputy or Assistant Attorney General" means an attorney employed by the state as a staff attorney in the Attorney General's

Office.

(2) "Private attorney" means any attorney who is neither a full-time Assistant Attorney General on the Attorney General's staff nor a full-time employee of another state agency.

(3) "State" means the State of West Virginia, including state officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of state government, and any of its agents.

(b) The Attorney General may appoint such deputy or assistant attorneys general as may be necessary to properly perform the duties of ~~his~~ the office. The total compensation of all such assistants shall be within the limits of the amounts appropriated by the Legislature for personal services. All deputies or assistant attorneys general so appointed shall serve at the pleasure of the Attorney General and shall perform such duties as ~~he may require~~ required of them.

All laws or parts of laws inconsistent with the provisions hereof are hereby amended to be in harmony with the provisions of this section.

(c) The state may not enter into a contingency fee contract, or any other legal arrangement, with a private attorney unless the Attorney General makes a written determination prior to entering into such a contract that the legal representation is both cost-effective and in the best interest of the public. Any written

determination shall include specific findings for each of the following factors:

(1) Whether sufficient and appropriate legal and financial resources exist within the Attorney General's office to handle the matter.

(2) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(3) The geographic area where the attorney services are to be provided.

(4) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

(d) If the Attorney General makes the determination described in subsection (c), the Attorney General shall request proposals from private attorneys to represent the state on a contingency fee basis, or any other basis, unless the Attorney General makes a written determination that one of the following factors applies:

(1) An emergency situation exists that requires time-sensitive legal services that cannot be adequately provided by the Office of Attorney General, and for which insufficient time exists to complete the customary competitive bidding process.

(2) An appointment, or the continuation of an appointment, is necessary to avoid disruption in pending legal matters by allowing

previously appointed outside counsel to continue providing legal representation.

(3) The legal services will be most effectively handled by preapproved attorneys who have already completed the bidding process referenced in subsection (h).

(e) Any Requests for Proposal shall be posted to the website of the Office of Attorney General, and the time period under which the proposal is open should be clearly stated.

(f) When soliciting proposals from private attorneys to represent the state on a contingency-fee basis, or any other basis, the Attorney General shall consider the following factors when determining the most competitive proposal for legal services, and make a written determination as to the application of these factors, prior to entering into any contract for outside legal services:

(1) Whether the private attorneys possess the requisite skills and expertise needed to handle the legal matters in question;

(2) Whether the private attorneys possess requisite staffing and support to handle the scope of the litigation or matter;

(3) Whether the private attorneys, or any members of the private attorneys' law firm, have been subject to reprimand by the West Virginia State Bar, or other entities, for unethical conduct;

(4) Whether the private attorneys have been peer rated, and if so, what peer ratings they have received, along with any other

recognitions or awards for legal services;

(5) The estimated fees, costs and expenses of the private attorneys to perform the legal services requested;

(6) The willingness of the private attorneys to enter into alternative billing arrangements;

(7) Whether the private attorneys are in compliance with all applicable laws of the State of West Virginia; and

(8) Any such other relevant factors as may be identified by the Attorney General.

(g) If, after soliciting proposals for legal services, the Attorney General determines that proposals received are insufficient based on an application of the factors set forth in subsection (f), the Attorney General may solicit additional proposals pursuant to subsections (c), (d) and (f).

(h) In order to address time sensitive or emergency legal matters that require the use of outside counsel, but do not allow sufficient time for completion of the competitive bidding process set forth in subsections (c), (d) and (f), the Office of Attorney General may institute a prebidding process for approving lawyers or law firms to perform legal work on behalf of the state in accordance with the following factors:

(1) Private attorneys may be preapproved to perform outside counsel work in specific areas of law provided that they have gone through a request for proposal and competitive bidding process as

set forth in subsections (d) and (f).

(2) In instances in which more than one lawyer or law firm has been preapproved for the provision of outside counsel legal services in an area of law, the Office of Attorney General shall perform an expedited, case-specific analysis using the factors set forth in subsection (f) to determine which lawyer or law firm would be better suited to represent the state on a particular legal matter.

(3) The office shall list any preapproved attorneys by practice area on the Attorney General's website.

(i) The state may not enter into a contract for private legal services unless the following requirements are met throughout the contract period and any extensions thereof:

(1) The Attorney General, or his or her designated employee(s) involved in the case, retain control over the course and conduct of the case.

(2) The Attorney General, or his or her designated employee(s) with supervisory authority, is personally involved in overseeing the litigation.

(3) The Attorney General, or his or her designated employee(s) involved in the case, retains veto power over any decisions made by outside counsel.

(4) Decisions regarding settlement of the case are reserved exclusively to the discretion of the Attorney General, his or her

designated employee(s) and the state or other client entity.

(j) The state may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee in excess of:

(1) Twenty-five percent of the first $10 million recovered; plus

(2) Twenty percent of any portion of the recovery between $10 million and $15 million; plus

(3) Fifteen percent of any portion of the recovery between $15 million and $20 million; plus

(4) Ten percent of any portion of the recovery between $20 million and $25 million; plus

(5) Five percent of any portion of the recovery exceeding $25 million.

In no event may the aggregate contingency fee for any legal matter exceed $50 million, exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery. A contingency fee may not be based on penalties or fines awarded or any amounts attributable to penalties or fines.

(k) The Attorney General shall develop a standard addendum to every contract for outside counsel attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the Attorney General's Office,

including, without limitation, the requirements listed in (i)(1)-(4), inclusive.

(l) Subject to the provisions of subsection (n), the Attorney General's written determination to enter into a contingency fee contract, or any other legal contract, with a private attorney shall be posted on the Attorney General's website for public inspection within fifteen business days after the date the contract is executed and shall remain posted on the website for the duration of the contract, including any extensions or amendments thereto. Any payment of contingency fees shall be posted on the Attorney General's website within thirty days after the payment of such fees to the private attorney and shall remain posted on the website for at least three hundred sixty-five days thereafter.

(m) Any private attorney under contract to provide services to the state shall, from the inception of the contract until at least four years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such legal services. In conjunction with the Attorney General's Office, the private attorney shall make all such records that are not covered by the attorney-client privilege or otherwise confidential in nature available for inspection and copying upon request in accordance with the West Virginia Freedom of Information Act, WV

Code §29B-1-1, et seq. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the matter for a period of at least four years, and shall promptly provide these records to the Attorney General upon request.

(n) The Attorney General retains the right to temporarily waive the disclosure requirements set forth in subsection (l) upon making a written determination that:

(1) A waiver is necessary to protect attorney-client or privileged information; or

(2) Immediate disclosure of the existence of outside counsel, or any other sensitive information, could compromise the initiation, handling, or conclusion of any investigation or case matter handled by the Office of Attorney General.

Once any risks to the attorney-client privilege or confidential work product are no longer present, the Office of Attorney General shall make any and all suspended disclosures as soon as possible, and all subsequent disclosures in accordance with the time frame and manner set forth by subsection (l).

(o) Nothing in this section expands the authority of any state agency or state agent to enter into contracts where no such authority previously existed.

§5-3-4. Annual report to Governor, President of the Senate and Speaker of the House.

(a) The Attorney General shall annually, on or before November 1, deliver to the Governor, President of the Senate and Speaker of the House a report ~~of~~ detailing:

(1) The state and condition of the several causes, in which the state is a party, pending in courts mentioned in section two of this article.

(2) The use of any contingency fee contracts with private attorneys in the preceding year. At a minimum, the report shall:

(A) Identify all new contingency fee contracts entered into during the year and all previously executed contingency fee contracts that remain current during any part of the year, and for each contract describe:

(i) The name of the private attorney with whom the state has contracted, including the name of the attorney's law firm;

(ii) The nature and status of the legal matter;

(iii) The name of the parties to the legal matter;

(iv) The amount of the recovery; and

(v) The amount of any contingency fee paid.

(B) Include copies of any written determinations made under subsections (c) and (d) of section three of this article during the year.

(b) The Attorney General's annual report shall also be posted on the Attorney General's website within thirty days of submitting the report to the Governor, President of the Senate, Speaker of the

House, and shall remain posted on the website for at least two years thereafter.

NOTE: The purpose of this bill is to clarify the powers of the Attorney General to enter into contracts for legal services with attorneys outside the Attorney General's office.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

HOUSE JOINT RESOLUTION NO.36

(By Delegates Armstead, Shott, O'Neal, E. Nelson, Ellington, Miller, Howell and Hunt)

(By Request of the Attorney General)

[Introduced March 22, 2013; referred to the Committee on Constitutional Revision then the Judiciary.]

Proposing an amendment to the Constitution of the State of West Virginia, amending article VII thereof, by adding thereto a new section, designated section twenty, relating to the eligibility of the Attorney General; numbering and designating such proposed amendment; and providing a summarized statement of the purpose of such proposed amendment.

Resolved by the Legislature of West Virginia, two thirds of the members elected to each house agreeing thereto:

That the question of ratification or rejection of an amendment to the Constitution of the State of West Virginia be submitted to the voters of the state at the next general election to be held in the year 2014, which proposed amendment is that article VII thereof be amended by adding thereto a new section, designated section twenty, to read as follows:

ARTICLE VII. Executive Department.

§20. Eligibility of Attorney General.

A person who has been elected or who has served as Attorney General during all or any part of two consecutive terms shall be ineligible for the Office of Attorney General during any part of the term immediately following the second of the two consecutive terms.

Resolved further, That in accordance with the provisions of article eleven, chapter three of the Code of West Virginia, 1931, as amended, such proposed amendment is hereby numbered "Amendment No. 1" and designated as the "Attorney General Term Limit Amendment" and the purpose of the proposed amendment is summarized as follows: "To amend the State Constitution to limit an Attorney General who serves all or any part of two consecutive terms from serving any part of the term immediately following the second of the two consecutive terms."

NOTE: The purpose of this resolution is to amend the state Constitution to limit any person serving as Attorney General to two consecutive terms, or a maximum of eight years.

This section is new; therefore, it has been entirely underscored.

Promise 7 - Take on the EPA

Review all existing lawsuits pending by Attorneys General and, after consultation with the Legislature and the Governor, determine which lawsuits against the federal government the State of West Virginia should join. The top priority will be focusing on Environmental Protection Agency (EPA) litigation.

Actions Taken:

✓ On February 11, 2013, Attorney General Morrisey sent a letter to President Barack Obama urging the President to take into account the interests of all Americans, including the people of West Virginia, when deciding whom to nominate as the new Environmental Protection Agency Administrator.
✓ In his letter to the President, Attorney General Morrisey informed President Obama that the Office of the West Virginia Attorney General would use every tool at its disposal to protect West Virginia's sovereign interests and fight federal overreach that harms the state's way of life.
✓ As part of Attorney General Morrisey's effort to identify potential environmental lawsuits affecting the state, the Office of the Attorney General has conducted an extensive review of all existing lawsuits brought by the states' attorneys general against the EPA, including, but not limited to the following:
    ✓ Lawsuits challenging the EPA's Endangerment Finding, Tailpipe Rule, and Timing & Tailoring Rule.
    ✓ Challenges to the EPA's "Cross-State Air Pollution Rule."
✓ The Office also has conducted an exhaustive docket search to identify other relevant environmental cases that may impact the state, and it has coordinated with officials in other states to identify any pending litigation in which West Virginia should participate.
✓ The Office of the Attorney General is working collaboratively with the West Virginia Department of Environmental Protection (WV DEP) regarding several matters that have a direct impact on the state's economy.
✓ The Attorney General's Office is currently drafting comments on several arbitrary aspects of an EPA-proposed rule that would invalidate certain West Virginia regulations concerning Startup, Shutdown, and Malfunction (SSM) regulations, and have a sweeping impact on West Virginia's energy resources.
✓ The Office of the Attorney General is working to ensure that arbitrary actions by the federal government do not derail the King Coal Highway - a vital economic development project in Southern West Virginia.

✓ Attorney General Morrisey is continuing to pursue litigation with several states and other interested parties challenging EPA air-emissions regulations that directly impact coal-fired power plants (*State of Michigan, et al v. Environmental Protection Agency,* Court of Appeals Docket # 12-1196). The regulations in question impose restrictive and unrealistic limits on emissions that could result in the closure of coal-fired power plants in West Virginia, Maryland, Ohio and Pennsylvania.
✓ Currently, the Office is working closely with WV DEP to provide legal assistance on a variety of regulatory matters to protect West Virginia's interests where it is potentially adverse to the federal government.
✓ The Attorney General's Office also is working with several states' attorneys general to ensure that the enormous potential for natural gas exploration in West Virginia and similarly situated states isn't negatively impacted by issues of federal overreach on the part of the EPA.

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
ATTORNEYGENERAL

(304) 558-2021
FAX (304) 558-0140

February 11, 2013

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Obama,

With the departure of Environmental Protection Agency (EPA) Administrator Lisa Jackson now imminent, you will soon nominate a new EPA Administrator for consideration by the Senate. Given our State's leading role in producing energy for the rest of the country, West Virginia has an obvious and significant interest in the selection of Ms. Jackson's replacement. As West Virginia's new Attorney General, I have grave concerns about the current direction of the EPA and hope that you will take the following considerations into account as the EPA transitions to a new Administrator.

At its core, West Virginia is an energy-producing state. Coal has been mined in this State since before its admission to the Union in 1863, when it was still part of the Commonwealth of Virginia. Families and communities have been defined by coal mining, and much of the culture of the southern part of this State revolves around coal mining to this day. The coal mined and other natural resources harvested in West Virginia play an important role outside our borders as well – West Virginia is ranked third in the country in total energy production. Moreover, with the discovery and development of the natural gas contained in the Marcellus Shale formation, which lies under much of West Virginia, our State is poised to retain its place as a leader in energy development for the United States.

Federal, and specifically EPA, overreach is thus a significant bipartisan concern in West Virginia. Congresswoman Shelley Moore Capito has expressed disappointment that the EPA's overreach frequently has a disproportionate adverse impact on West Virginians. And as recently as October 2012, Senators Jay Rockefeller and Joe Manchin joined U.S. Representatives David McKinley and Nick Rahall to criticize the EPA for its delay in issuing a permit for a West Virginia mining site. Delays of this type have significant economic and human impacts; that single delay resulted in the layoff of nearly 150 workers. Other actions taken by the EPA have also contributed to significant job losses in West Virginia.

Some State officials have been willing to defend West Virginia's energy industry against regulatory encroachment in the courts. During his time as Governor, Senator Manchin encouraged the West Virginia Department of Environmental Protection (WVDEP) to file suit against the EPA, challenging some of its policies and procedures that impeded the issuance of new mining permits in West Virginia and throughout Appalachia. Likewise, under Governor Earl Ray Tomblin, the WVDEP has participated as amicus curiae, both at the trial and appellate levels, in support of a challenge to the EPA's decision to retroactively withdraw a permit that had already been issued for a West Virginia surface mine.

My predecessor passed on opportunities to participate in litigation to protect West Virginia's energy interests, but I intend to be much more aggressive in defending West Virginia against EPA overreach. I promised the citizens of this State that, as their new Attorney General, I would uphold the principles of federalism and work to ensure that the federal government does not take actions that are inconsistent with the U.S. Constitution and the rule of law. Further, I vowed to review each lawsuit brought by state Attorneys General and carefully evaluate whether West Virginia should become involved.

For example, although my predecessor did not join a successful multi-state challenge to the EPA's cross-state pollution regulations, I will strongly consider doing so in the future if the EPA continues to defend them. Fifteen state Attorneys General challenged the EPA's regulations that sought to cap certain emissions from power plants. The U.S. Court of Appeals for the D.C. Circuit agreed with those states that the Agency had exceeded its legal authority, and recently refused the EPA's request to reconsider that decision. I will be closely monitoring this case as the EPA determines its next steps.

In the weeks and months ahead, my office will be following carefully the EPA's actions concerning a wide variety of other matters that impact West Virginia. As you begin your second term in office, the EPA is reportedly evaluating its plans with respect to several major regulatory matters, including its procedures for approving mining permits and potential changes to the emission standards for power plants. The State of West Virginia cares very deeply about these issues, as those decisions will have a tremendous effect on our State's job base and economic livelihood. As Attorney General, I will be personally reviewing these and other matters that may have a detrimental impact on our extractive industries to ensure that any regulations or guidance issued comport with the rule of law.

Our goal is straightforward: we seek to ensure that the Agency does not take any legal shortcuts in its efforts to advance its policy goals. We will use every tool at our disposal, including legal, policy, and educational mechanisms, to protect West Virginia's sovereign interests and fight federal overreach that harms our way of life. It is my intent to work collaboratively with your Administration, other Attorneys General, state officials, state officeholders, and Congress to accomplish this goal.

I write to you because it is my hope that the EPA will, in the future, adhere to its statutory charge far more closely than it has over the past four years. I respect that you may have different

priorities than those officeholders who only represent West Virginia interests, and that duly-elected officeholders in the United States have a right to pursue the policy goals on which they campaigned. However, all of us also have taken an oath to uphold the U.S. Constitution, and we each have an overriding duty to act in a manner consistent with the rule of law while pursuing such goals. When my office reviews EPA regulations, policies, and actions, we will do so with that oath and duty in mind.

I am confident that, if the EPA continues on its current path, federal courts will continue their recent trend of striking down Agency action. Last March, the Supreme Court unanimously rejected the EPA's attempt to read the Clean Water Act in a way that would insulate certain agency decisions from judicial review. The D.C. Circuit recently invalidated certain biofuel projections issued by the EPA, finding that the Agency violated its statutory authority by using a biased methodology rather than simply seeking to make an accurate prediction. And just a few months ago, the Sixth Circuit Court of Appeals rejected the EPA's attempt to treat multiple facilities spread over forty-three square miles as a single source, in an effort to subject their owner to stricter emission regulations.

When you are deciding whom to nominate as EPA Administrator, I would ask that you carefully consider the EPA's recent track record and take into account the interests of *all* Americans, including the people of West Virginia. I implore you to choose a nominee who is committed to acting within the law. Moreover, I urge you not to select a person who would aggressively engage in a war against coal and extractive industries, as recent reports suggest is your intent. We both surely can agree that the resources currently being spent to unsuccessfully defend the EPA's overreach can be better spent elsewhere.

Thank you for your consideration of my concerns. I wish you well in nominating an Administrator who is both capable and willing to abide by the rule of law.

Sincerely,

Patrick Morrisey

Patrick Morrisey
Attorney General of the State of West Virginia

Cc: Senator Jay Rockefeller IV
Senator Joe Manchin
Congresswoman Shelley Moore Capito
Congressman David McKinley
Congressman Nick Rahall II
Governor Earl Ray Tomblin
Cc: U.S. Senate Committee on Environment and Public Works
Cc: Congressman Fred Upton, Chair, U.S. House of Representatives Committee on Energy and Commerce
Cc: Congressman Doc Hastings, Chair, U.S. House of Representatives Committee on Natural Resources

Promise 8 - Create an Office of Federalism & Freedom

Establish an Office of Federalism and Freedom to refocus some of the Office's priorities on challenging federal policies that have a tenuous nexus to law or the U.S. and West Virginia Constitutions.

Actions Taken:

✓ Attorney General Morrisey has initiated an informal working group of in-house attorneys, and is actively collaborating with other states' attorneys general, to take action on issues of federal overreach. Attorney General Morrisey decided to maintain this office in an informal manner, instead of creating a formal new department, so that he could save monies and utilize the Office's cross-cutting expertise on a variety of substantive issues relating to federal overreach.

✓ On top of fulfilling other daily responsibilities related to client demands and enforcement matters, the Office of the Attorney General has taken on a number of matters relating to federal overreach. Those matters include:

- ✓ Joining with seven other states in a lawsuit challenging the constitutionality of certain provisions of the Dodd-Frank Act.
- ✓ Joining with nineteen other states in filing a "friend of the court" brief in a case before the United States Supreme Court on the constitutionality of a New York statute that limits individual rights under the Second Amendment.
- ✓ Assisting the West Virginia Department of Environmental Protection on a variety of EPA-related issues that negatively impact West Virginia's economy.
- ✓ Actively reviewing environmental lawsuits for issues of federal overreach that may impact the state.
- ✓ Continuing to pursue a multi-state challenge of the Environmental Protection Agency's Utility MACT Rule -- which could result in the closure of coal-fired power plants in West Virginia -- in the United States Court of Appeals for the District of Columbia. *State of Michigan, et al v. Environmental Protection Agency,* Court of Appeals Docket # 12-1196.
- ✓ Joining with twelve other states in a letter asking the U.S. Department of Health & Human Services to adopt broader religious exemptions to insurance mandates imposed pursuant to the Affordable Care Act.
- ✓ Scrutinizing additional healthcare and religious liberty lawsuits brought by states against the federal government within the arena of federal overreach.
- ✓ Working with other states to ensure that West Virginia's natural gas prospects aren't negatively impacted by issues of federal overreach on the part of the EPA.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING
901 South Main Street
Big Spring, TX 79720;

STATE OF ALABAMA, by and through LUTHER STRANGE, in his official capacity as Attorney General of Alabama
501 Washington Avenue
Montgomery, AL 36130;

STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA
40 Capitol Square SW
Atlanta, GA 30334;

STATE OF KANSAS *ex rel.* DEREK SCHMIDT, in his official capacity as
Attorney General of Kansas
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612;

BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF MICHIGAN;
G. Mennen Williams Building, 7th Floor
525 W. Ottawa St.
P.O. Box 30212
Lansing, MI 48909;

STATE OF MONTANA, by and through TIMOTHY C. FOX, ATTORNEY GENERAL OF THE STATE OF MONTANA
215 North Sanders
P.O. Box 201401
Helena, MT 59620;

STATE OF NEBRASKA, by and through JON C. BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA
2115 State Capitol

Case No. 1:12-cv-01032

Judge: Hon. Ellen S. Huvelle

P.O. Box 98920
Lincoln, NE 68509;

STATE OF OHIO, by and through MICHAEL DeWINE,
ATTORNEY GENERAL OF OHIO
30 East Broad Street, 14th Floor
Columbus, OH 43215;

STATE OF OKLAHOMA
EX REL. SCOTT PRUITT
in his official capacity as
Attorney General of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105;

STATE OF SOUTH CAROLINA
EX REL. ALAN WILSON
in his official capacity as
Attorney General of South Carolina
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201;

STATE OF TEXAS, by and through
GREG ABBOTT, ATTORNEY GENERAL
OF THE STATE OF TEXAS
300 W. 15th Street
Austin, TX 78701;

STATE OF WEST VIRGINIA
EX REL. PATRICK MORRISEY
in his official capacity as
Attorney General of West Virginia
State Capitol Complex,
Building 1 Room 26-E
Charleston, WV 25305;

THE 60 PLUS ASSOCIATION, INC
515 King Street
Suite 315
Alexandria, VA 22314;

and

THE COMPETITIVE ENTERPRISE INSTITUTE

1899 L Street
Floor 12
Washington, DC 20036,

Plaintiffs,

v.

NEIL S. WOLIN,[1] in his official capacity as Acting United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council
1500 Pennsylvania Avenue, NW
Washington, DC 20220;

U.S. DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue, NW
Washington, DC 20220;

RICHARD CORDRAY, in his official capacity as Director of the Consumer Financial Protection Bureau, in his official capacity as *ex officio* Director of the Federal Deposit Insurance Corporation, and in his official capacity as *ex officio* member of the Financial Stability Oversight Council
1700 G Street NW
Washington, DC 20552;

THE CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington, DC 20552;

BENJAMIN BERNANKE, in his official capacity as Chairman of the Board of Governors of the Federal Reserve System, and in his official capacity as *ex officio* Member of the Financial Stability Oversight Council

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Acting U.S. Secretary of the Treasury Wolin has been substituted as a defendant for former Secretary Geithner, and Chairman of the U.S. Securities and Exchange Commission Walter has been substituted as a defendant for former Chairman Schapiro. Additionally, the caption has been revised to reflect Mr. Gruenberg's new office as Chairman of the Board of Directors of the Federal Deposit Insurance Corporation. Corresponding conforming changes have been made to paragraphs 45, 57, 62, and 150.

20th Street and Constitution Avenue NW
Washington, DC 20551;

JANET YELLEN, in her official capacity as Vice Chairman of the Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551;

ELIZABETH DUKE, in her official capacity as Member of the Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551;

JEROME POWELL, in his official capacity as Member of the Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551;

SARAH BLOOM RASKIN, in her official capacity as Member of the Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551;

JEREMY STEIN, in his official capacity as Member of the Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551;

DANIEL TARULLO, in his official capacity as Member of the Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551;

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
20th Street and Constitution Avenue NW
Washington, DC 20551;

MARTIN GRUENBERG, in his official capacity as Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and in his official

capacity as *ex officio* Member of the Financial Stability Oversight Council
550 17th Street NW
Washington, DC 20429;

THOMAS HOENIG, in his official capacity as Director of the Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429;

JEREMIAH NORTON, in his official capacity as Director of the Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429;

THOMAS CURRY, in his official capacity as U.S. Comptroller of the Currency, in his official capacity as *ex officio* Director of the Federal Deposit Insurance Corporation, and in his official capacity as *ex officio* member of the Financial Stability Oversight Council
Comptroller of the Currency
Administrator of National Banks
Washington, DC 20219;

THE FEDERAL DEPOSIT INSURANCE CORPORATION
550 17th Street NW
Washington, DC 20429;

ELISSE B. WALTER, in her official capacity as Chairman of the U.S. Securities and Exchange Commission and *ex officio* member of the Financial Stability Oversight Council
100 F Street NE
Washington, DC 20549;

GARY GENSLER, in his official capacity as Chairman of the U.S. Commodity Futures Trading Commission and *ex officio* member of the Financial Stability Oversight Council
Three Lafayette Center
1155 21st Street
Washington, DC 20581;

DEBBIE MATZ, in her official capacity as Chairman of

the National Credit Union Administration Board and *ex officio* Member of the Financial Stability Oversight Council
1775 Duke Street
Alexandria, VA 22314;

S. ROY WOODALL, in his official capacity as Member of the Financial Stability Oversight Council
1500 Pennsylvania Avenue, NW
Washington, DC 20220;

and

THE FINANCIAL STABILITY OVERSIGHT COUNCIL
1500 Pennsylvania Avenue, NW
Washington, DC 20220,

Defendants.

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The above-captioned plaintiffs, by and through their undersigned attorneys,[2] allege as follows:

INTRODUCTION

1. By this action, the Private Plaintiffs challenge the unconstitutional formation and operation of the Consumer Financial Protection Bureau ("CFPB"), an agency created by Title X

[2] This action consists of two groups of plaintiffs: the "Private Plaintiffs," consisting of State National Bank of Big Spring, the 60 Plus Association, Inc., and the Competitive Enterprise Institute; and the "State Plaintiffs," consisting of the State of Alabama, the State of Georgia, the State of Kansas, the State of Michigan, the State of Montana, the State of Nebraska, the State of Ohio, the State of Oklahoma, the State of South Carolina, the State of Texas, and the State of West Virginia. As specified in the signature block, they are represented by separate counsel. The State Plaintiffs' allegations and claims are limited to Title II of the Dodd-Frank Act, as described below.

of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010) ("Dodd-Frank Act").

2. By this action, the Private Plaintiffs challenge the unconstitutional appointment of CFPB Director Richard Cordray, appointed to office neither with the Senate's advice and consent, nor during a Senate recess.

3. By this action, the Private Plaintiffs challenge the unconstitutional creation and operation of the Financial Stability Oversight Council ("FSOC"), an inter-agency "council" created by Title I of the Dodd-Frank Act.

4. By this action, the Plaintiffs challenge the unconstitutional creation and operation of a new authority for the "orderly liquidation" of financial institutions under Title II of the Dodd-Frank Act ("Orderly Liquidation Authority").

5. These Titles of the Dodd- Frank Act violate the Constitution in several ways:

6. First, the CFPB's formation and operation violates the Constitution's separation of powers. Title X of the Dodd-Frank Act delegates effectively unbounded power to the CFPB, and couples that power with provisions insulating the CFPB against meaningful checks by the Legislative, Executive, and Judicial Branches, as described in ¶¶ 51-107, below. Taken together, these provisions remove all effective limits on the CFPB Director's discretion, a violation of the separation of powers.

7. Second, the President unconstitutionally appointed Richard Cordray to be CFPB Director by refusing to secure the Senate's advice and consent while the Senate was in session, one of the few constitutional checks and balances on the CFPB left in place by the Dodd-Frank Act, as described in ¶¶ 108-118, below.

8. Third, the FSOC's formation and operation violates the Constitution's separation of powers. The FSOC has sweeping and unprecedented discretion to choose which nonbank financial companies to designate as "systemically important" (or, "too big to fail"). That designation signals that the selected companies have the implicit backing of the federal government—and, accordingly, an unfair advantage over competitors in attracting scarce, fungible investment capital. Yet the FSOC's sweeping powers and discretion are not limited by any meaningful statutory directives. And the FSOC, whose members include nonvoting state officials appointed by state regulators rather than the President, is insulated from meaningful judicial review—indeed, from all judicial review brought by third parties injured by an FSOC designation—as described in ¶¶ 119-141, below. Taken together, these provisions provide the FSOC virtually boundless discretion in making its highly consequential designations, a violation of the separation of powers.

9. Fourth, the "Orderly Liquidation Authority" violates the separation of powers. Title II of the Dodd-Frank Act empowers the Treasury Secretary to order the liquidation of a financial company with little or no advance warning, under cover of mandatory secrecy, and without either useful statutory guidance or meaningful legislative, executive, or judicial oversight. Moreover, Title II empowers the FDIC to unilaterally violate the rights of financial companies' creditors (and unilaterally choose favorites among similarly situated creditors) while carrying out that "liquidation." All of this occurs without meaningful judicial review, as described in ¶¶ 142-178, below.

10. Fifth, the Orderly Liquidation Authority violates the mandate of the Fifth Amendment to the United States Constitution that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The forced liquidation of a company with little

or no advance warning, in combination with the FDIC's virtually unlimited power to choose favorites among similarly situated creditors in implementing the liquidation, denies the subject company and its creditors constitutionally required notice and a meaningful opportunity to be heard before their property is taken—and likely becomes unrecoverable, as described in ¶¶ 142-178, below.

11. Sixth, the Orderly Liquidation Authority violates the requirement in Article I, Section 8, Clause 4 of the United States Constitution, that any "Laws on the subject of Bankruptcies throughout the United States" be "uniform." With no meaningful limits on the discretion conferred on the Treasury Secretary or on the FDIC, Title II not only empowers the FDIC to choose which companies will be subject to liquidation under Title II, but also confers on the FDIC unilateral authority to provide special treatment to whatever creditors the FDIC, in its sole and unbounded discretion, decides to favor, as described in ¶¶ 142-178, below.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201.

13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (e).

PARTIES

14. Plaintiff State National Bank of Big Spring ("Bank") is a Texas corporation and federally-chartered bank headquartered in Big Spring, Texas. The Bank opened in 1909 and currently has three locations in Big Spring, Lamesa, and O'Donnell, Texas. The Bank is a local community bank with less than $275 million in deposits and offers customers access to checking accounts, savings accounts, certificates of deposit, and individual retirement accounts.

15. Title X of the Dodd-Frank Act, and CFPB Director Richard Cordray's unconstitutional appointment to direct that agency, injure the Bank. As a result of the CFPB's

promulgation of a Final Rule regulating international remittance transfers imposing burdensome requirements on financial institutions and other providers of those services, the Bank has stopped offering those services to its customers.

16. The Bank is further injured because Title X requires the Bank to conduct its business, and make decisions about what kinds of business to conduct, without knowing whether the CFPB will retroactively announce that one or more of the Bank's consumer lending practices is "unfair," "deceptive," or "abusive" and enforce that interpretation through supervision, investigation, or enforcement activities. Title X's open-ended grant of power to the CFPB, combined with the absence of checks and balances limiting the CFPB from expansively interpreting that grant of power, creates a cloud of regulatory uncertainty that forces banks to censor their own offerings—a chilling effect that, for example, left the Bank with no safe choice but to exit the consumer mortgage business and not return until the CFPB's authority and discretion are defined with greater specificity, transparency, and accountability.

17. Indeed, statements of CFPB Director Cordray and other officials connected to the CFPB heighten the likelihood that the Bank's mortgage products could be deemed unlawful, after the fact, by the CFPB—as described in ¶¶ 51-107, below.

18. Plaintiff 60 Plus Association, Inc. ("Association") is a seven-million member, non-profit, non-partisan seniors advocacy group that is tax-exempt under Section 501(c)(4) of the Internal Revenue Code. It is devoted to advancing free markets and strengthening limits on government regulation. One of its goals is to preserve access to credit and financial products for seniors, such as mortgages and reverse mortgages. Founded in 1992, it is based in Alexandria, Virginia.

19. The Dodd-Frank Act harms the members of the 60 Plus Association in that it has reduced, and will further reduce, the range and affordability of banking, credit, investment, and savings options available to them. For example, provisions enforced by the CFPB have reduced the availability of free checking, and the number of banks offering it; they have reduced the number of companies offering mortgages; and they have increased mortgage fees.

20. The 60 Plus Association surveys its members regarding their interest in a variety of financial products that it might offer to them as benefits. These products range from investment programs and bank accounts to credit cards and insurance. The Dodd-Frank Act harms both the Association and its members by increasing the cost and reducing the availability of such products, both currently and in the near future.

21. Plaintiff Competitive Enterprise Institute ("CEI") is a tax-exempt, nonprofit public interest organization under Section 501(c)(3) of the Internal Revenue Code. It is dedicated to advancing the principles of individual liberty and limited government. To those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory and legal issues. It also participates in cases involving financial regulation and constitutional checks and balances, such as the separation of powers and federalism: *e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011); and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). Founded in 1984, it is based in Washington, D.C.

22. CEI has checking and brokerage accounts and certificates of deposit ("CDs") in banks and brokerage firms regulated by the CFPB that qualify as systemically important under the Dodd-Frank Act as enforced by FSOC. For example, it has checking accounts and CDs at Wells Fargo, and CDs at Merrill Lynch. It also has credit cards with terms subject to regulation

by the CFPB under Dodd-Frank. The nature and cost of these accounts are jeopardized by the CFPB's sweeping regulatory authority over them and over the institutions in which they are based.

23. Plaintiff State of Alabama, by and through Luther Strange, Attorney General of the State of Alabama, is a sovereign State of the United States of America.

24. Alabama's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit A, and is incorporated into this complaint by reference. The State of Alabama is ultimately liable for the payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of Alabama. The terms "Alabama" and "State of Alabama" are accordingly used interchangeably throughout this Complaint with the term "Alabama's pension funds."

25. Plaintiff State of Georgia, by and through Samuel S. Olens, Attorney General of the State of Georgia, is a sovereign State of the United States of America.

26. Georgia has investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit B, and is incorporated into this complaint by reference. The State of Georgia is directly harmed by any loss of property rights or investment value in those assets.

27. Plaintiff State of Kansas, by and through Derek Schmidt, Attorney General of the State of Kansas, is a sovereign State of the United States of America.

28. Kansas's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit C, and is incorporated into this complaint by reference. The State of Kansas is ultimately liable for the payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of Kansas. The terms "Kansas" and "State of Kansas" are accordingly used interchangeably throughout this Complaint with the term "Kansas's pension funds."

29. Bill Schuette, Attorney General of Michigan, is bringing this action on behalf of the People of Michigan under Mich. Comp. Law § 14.28, which provides that the Michigan Attorney General may "appear for the people of [Michigan] in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of [Michigan] may be a party or interested." Under Michigan's constitution, the people are sovereign. Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection."). The State of Michigan is a sovereign State of the United States of America.

30. Michigan's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit D, and

is incorporated into this complaint by reference. The State of Michigan is ultimately liable for the payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of Michigan. The terms "Michigan" and "State of Michigan" are accordingly used interchangeably throughout this Complaint with the term "Michigan's pension funds."

31. Plaintiff State of Montana, by and through Timothy C. Fox, Attorney General of the State of Montana, is a sovereign State of the United States of America.

32. Montana's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit E, and is incorporated into this complaint by reference. The State of Montana is ultimately liable for the payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of Montana. The terms "Montana" and "State of Montana" are accordingly used interchangeably throughout this Complaint with the term "Montana's pension funds."

33. Plaintiff State of Nebraska, by and through Jon C. Bruning, Attorney General of the State of Nebraska, is a sovereign State of the United States of America.

34. Nebraska's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit F, and is incorporated into this complaint by reference. The State of Nebraska is ultimately liable for the

payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of Nebraska. The terms "Nebraska" and "State of Nebraska" are accordingly used interchangeably throughout this Complaint with the term "Nebraska's pension funds."

35. Plaintiff State of Ohio, by and through its Attorney General Michael DeWine, is a sovereign State of the United States of America.

36. Various governmental entities in Ohio, including the Ohio Attorney General's Office, have public monies in public investment pools that hold commercial paper and/or bonds issued by financial companies as defined by Section 210 of the Dodd-Frank Act and thereby subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit G, and is incorporated into this complaint by reference. The State of Ohio is directly harmed by any loss of property rights or investment value suffered in connection with such holdings.

37. Plaintiff State of Oklahoma, by and through E. Scott Pruitt, Attorney General of the State of Oklahoma, is a sovereign State of the United States of America.

38. Oklahoma's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit H, and is incorporated into this complaint by reference. The State of Oklahoma is ultimately liable for the payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State

of Oklahoma. The terms "Oklahoma" and "State of Oklahoma" are accordingly used interchangeably throughout this Complaint with the term "Oklahoma's pension funds."

39. Plaintiff State of South Carolina, by and through Alan Wilson, Attorney General of the State of South Carolina, is a sovereign State of the United States of America.

40. South Carolina's pension funds have investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit I, and is incorporated into this complaint by reference. The State of South Carolina is ultimately liable for the payment of pensions that have been promised to State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of South Carolina. The terms "South Carolina" and "State of South Carolina" are accordingly used interchangeably throughout this Complaint with the term "South Carolina's pension funds."

41. Plaintiff State of Texas, by and through Greg Abbott, Attorney General of Texas, is a sovereign State of the United States of America.

42. Texas, through the Texas Treasury Safekeeping Trust Company, has investments in a variety of institutions that qualify as financial companies as defined by Section 210 of the Dodd-Frank Act, rendering those companies subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit J, and is incorporated into this complaint by reference. The State of Texas is directly harmed by any loss of property rights or investment value suffered by the Texas Treasury Safekeeping Trust Company. The terms "Texas" and "State of Texas" are accordingly

used interchangeably throughout this Complaint with the term "Texas Treasury Safekeeping Trust Company."

43. Plaintiff State of West Virginia, by and through Patrick Morrisey, Attorney General of the State of West Virginia, is a sovereign State of the United States of America.

44. The State of West Virginia has public monies, including monies in public pension funds, in investment pools that hold commercial paper and/or bonds issued by financial companies as defined by Section 210 of the Dodd-Frank Act and thereby subject to the Orderly Liquidation Authority created by Title II of the Dodd-Frank Act. A non-exhaustive list of those investments is attached to this Complaint as Exhibit K, and is incorporated into this complaint by reference. The State of West Virginia is directly harmed by any loss of property rights or investment value suffered in connection with such holdings. With regard to monies in public pension funds in particular, the State of West Virginia is liable for the payment of pensions to qualifying State employees, and thus any loss of property rights or investment value suffered by the State's pension funds directly harms the State of West Virginia.

45. Defendant Neil S. Wolin is the Acting United States Secretary of the Treasury, and the *ex officio* Chairman of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

46. Defendant U.S. Department of the Treasury is located in Washington, D.C.

47. Defendant Richard Cordray is Director of the Consumer Financial Protection Bureau, an *ex officio* Director of the Federal Deposit Insurance Corporation, and an *ex officio* member of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

48. Defendant Consumer Financial Protection Bureau is located in Washington, D.C.

49. Defendant Benjamin Bernanke is Chairman of the Board of Governors of the Federal Reserve System, and an *ex officio* member of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

50. Defendant Janet Yellen is Vice Chairman of the Board of Governors of the Federal Reserve System; she is located in Washington, D.C., and she is named in her official capacity.

51. Defendant Elizabeth Duke is a member of the Board of Governors of the Federal Reserve System; she is located in Washington, D.C., and she is named in her official capacity.

52. Defendant Jerome Powell is a member of the Board of Governors of the Federal Reserve System; he is located in Washington, D.C., and he is named in his official capacity.

53. Defendant Sarah Bloom Raskin is a member of the Board of Governors of the Federal Reserve System; she is located in Washington, D.C., and she is named in her official capacity.

54. Defendant Jeremy Stein is a member of the Board of Governors of the Federal Reserve System; he is located in Washington, D.C., and he is named in his official capacity.

55. Defendant Daniel Tarullo is a member of the Board of Governors of the Federal Reserve System; he is located in Washington, D.C., and he is named in his official capacity.

56. Defendant the Board of Governors of the Federal Reserve System is an agency of the United States, located in Washington, D.C.

57. Defendant Martin Gruenberg is Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and an *ex officio* member of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

58. Defendant Thomas Hoenig is a Director of the Federal Deposit Insurance Corporation; he is located in Washington, D.C., and he is named in his official capacity.

59. Defendant Jeremiah Norton is a Director of the Federal Deposit Insurance Corporation; he is located in Washington, D.C., and he is named in his official capacity.

60. Defendant Thomas Curry is U.S. Comptroller of the Currency, an *ex officio* Director of the Federal Deposit Insurance Corporation, and an *ex officio* member of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

61. Defendant Federal Deposit Insurance Corporation is located in Washington, D.C.

62. Defendant Elisse B. Walter is Chairman of the U.S. Securities and Exchange Commission, and an *ex officio* member of the Financial Stability Oversight Council; she is located in Washington, D.C., and she is named in her official capacity.

63. Defendant Gary Gensler is Chairman of the U.S. Commodity Futures Trading Commission, and an *ex officio* member of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

64. Defendant Debbie Matz is Chairman of the National Credit Union Administration Board, and an *ex officio* member of the Financial Stability Oversight Council; she is located in Washington, D.C., and she is named in her official capacity.

65. Defendant S. Roy Woodall is a member of the Financial Stability Oversight Council; he is located in Washington, D.C., and he is named in his official capacity.

66. Defendant Financial Stability Oversight Council is located in Washington, D.C.

THE CONSUMER FINANCIAL PROTECTION BUREAU

67. The Private Plaintiffs allege as follows, with respect to the CFPB:

68. Section 1011(a) of the Dodd-Frank Act establishes a new Consumer Financial Protection Bureau to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."

69. Section 1011(a) declares the CFPB to be an "Executive agency" within the meaning of 5 U.S.C. § 105. But the same provision also declares the CFPB to be an "independent bureau" that is "established in the Federal Reserve System," which is in turn led by the Board of Governors of the Federal Reserve System ("FRB"), an "independent regulatory agency" under 44 U.S.C. § 3502(5).

Title X Delegates Effectively Unlimited Power To The CFPB To Litigate, Investigate, Regulate, and Enforce Against Practices That The CFPB Deems To Be "Unfair," "Deceptive," or "Abusive"

70. The Dodd-Frank Act grants the CFPB vast authority over consumer financial product and service firms, including Plaintiff State National Bank of Big Spring.

71. Section 1031(a) of the Dodd-Frank Act authorizes the CFPB to take any of several enumerated actions, including direct enforcement action, to prevent a covered person or service provider from committing or engaging in "unfair," "deceptive," or "abusive" practices in connection with the provision or offering of a consumer financial product or service.

72. And Section 1031(b) of the Act authorizes the CFPB to prescribe rules identifying unfair, deceptive, or abusive acts or practices under Federal law in connection with any transaction with a consumer for a consumer financial product or service.

73. But the Act provides *no* definition for "unfair" or "deceptive" acts or practices, leaving those terms to the CFPB to interpret and enforce, either through *ad hoc* litigation or through regulation. Nor is the CFPB bound by prior agencies' interpretation of similar statutory terms.

74. Nor does the Act provide meaningful limits on what the CFPB can deem an "abusive" act or practice. Section 1031(d) leaves that term to be defined by the CFPB, subject only to the requirement that the CFPB not define an act or practice to be "abusive" unless it "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of — (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." Sec. 1031(d).[3] Those nominal limits offer no transparency or certainty for lenders, because the limits consist exclusively of subjective factors that can only be ascertained on a case-by-case, borrower-by-borrower, *ex post facto* basis, and can be interpreted broadly by the CFPB because the agency is subject to no effective checks or balances by the other branches.

75. In fact, the CFPB Director has himself acknowledged this. In a January 24, 2012 hearing before a subcommittee of the U.S. House Committee on Oversight and Government Reform, CFPB Director Cordray stated that the Act's use of the term "abusive" is "a little bit of a puzzle because it is a new term"; the CFPB has "been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs."

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[3] All "Sec." citations refer to the sections of the Dodd-Frank Act.

76. The Act's open-ended grant of power over what the CFPB deems to be "unfair," "deceptive," or "abusive" lending practices is further exacerbated by the CFPB's discretion to unilaterally exempt any class of covered persons, service providers, or consumer financial products or services from the scope of any rule promulgated under Title X. Sec. 1022(b)(3).

77. While the Act allows the CFPB to define and enforce those open-ended standards through rulemaking, CFPB Director Cordray already announced (as noted above) his intention to define and enforce them primarily through ad hoc, *ex post facto* enforcement activities. That leaves regulated entities, such as State National Bank of Big Spring, at substantial risk that the CFPB will define or re-define what is legal and illegal, likely on a case-by-case, *ex post facto* basis, only *after* the bank has executed a mortgage or other consumer lending transaction.

78. The CFPB's unbridled authority to newly define what constitutes an "unfair," "deceptive," or "abusive" lending practice on a case-by-case, *ex post facto* basis, imposes severe regulatory risk upon lenders, including Plaintiff State National Bank of Big Spring, which cannot know in advance, with reasonable certainty, whether longstanding or new financial services will open them to retroactive liability according to the CFPB.

79. In pursuing practices it deems to be "unfair," "deceptive," or "abusive," the CFPB is further empowered to require insured depository institutions, including Plaintiff State National Bank of Big Spring, to provide reports to the CFPB containing "information owned or under the control of [the institution], regardless of whether such information is maintained, stored or processed by another person," for the purpose of "assess[ing] and detect[ing] risks to consumers and consumer financial markets." Sec. 1026(b).

80. The CFPB is also empowered to refer activities it deems to be "a material violation of a Federal consumer financial law" to the prudential regulator of an insured

depository institution—in the case of Plaintiff State National Bank of Big Spring, the Office of the Comptroller of the Currency—"and recommend appropriate action to respond." Sec. 1026(d)(2)(A). When the CFPB makes such a referral to a prudential regulator, the prudential regulator is required to "provide a written response to the Bureau not later than 60 days thereafter." Sec. 1026(d)(2)(B).

81. The CFPB can also intervene directly in examinations conducted by the prudential regulators of insured depository institutions such as Plaintiff State National Bank of Big Spring. Specifically, the CFPB can include CFPB examiners on a sample basis in examinations conducted by the prudential regulator. Sec. 1026(c)(1). When the CFPB includes one of its examiners in an examination conducted by a prudential regulator, the regulator is required to "involve such Bureau examiner in the entire examination process," "provide all reports, records, and documentation related to the examination process … to the Bureau on a timely and continual basis," and "consider input of the Bureau concerning the scope of an examination, conduct of the examination, the contents of the examination report, the designation of matters requiring attention, and examination ratings." Sec. 1026(c)(2).

82. The CFPB thus not only has direct enforcement authorities of its own, but also substantially influences and effectively directs and controls the enforcement and examination activities of prudential regulators, by defining the terms "unfair," "deceptive," and "abusive" in ways that bind prudential regulators, both through formal regulations and through informal directives and guidance; by referring insured depository institutions to prudential regulators for investigation and requiring the prudential regulators to provide a written response to such referrals; and by inserting the CFPB and its examiners directly into the examinations conducted by prudential regulators.

83. The resulting chilling effect of the direct and indirect investigative, enforcement, and referral authorities vested in the CFPB by Title X forces lenders such as the Bank to either risk burdensome federal investigation or prosecution or curtail their own services and products.

84. For example, Title X's broad terms, as administered by the CFPB, already have forced Plaintiff Big Spring National Bank to discontinue its own mortgage lending, because its mortgage lending practices are within the CFPB's jurisdiction (*i.e.*, they are consumer financial products or services) yet the Bank cannot be reasonably certain, *ex ante*, whether the CFPB and/or the Office of the Comptroller of the Currency (influenced and directed by the CFPB, and subject to the CFPB's interpretation of the consumer financial laws) will investigate or litigate against them, deeming those practices to be "unfair," "deceptive," or "abusive" pursuant to an *ex post facto* CFPB interpretation of the law.

85. The Bank's mortgage services and products traditionally focused on real estate in the Bank's geographic area where real estate is generally bought and sold at relatively low prices, and where mortgage borrowers traditionally pay relatively large down payments; rather than charging their customers "points" for the mortgages, the Bank structured its mortgages to feature a five-year "balloon payment."

86. The Bank's mortgage business was regularly profitable, and was deemed by the Bank to be one of the best and most prudent ways to invest and make a return on the Bank's deposits.

87. Unfortunately, due to Title X's lack of meaningful limits on what constitutes an "unfair," "deceptive," or "abusive" practice, combined with the lack of checks and balances guiding and limiting the CFPB's discretion in administering those open-ended grants of power, the Bank could not be reasonably certain that continued lending on these terms would not expose

the Bank to sudden enforcement actions by the CFPB or, at the influence and direction of the CFPB, by the Office of the Comptroller of the Currency.

88. The overwhelming uncertainty inherent in Title X's open-ended grant of power to the CFPB and the lack of checks and balances limiting the CFPB's exercise of that power has been exemplified and amplified by statements from various officials stressing the breadth of the CFPB's power and the CFPB's intent to define consumer finance law on a case-by-case basis.

89. For example, on September 17, 2010, President Obama announced the appointment of Elizabeth Warren as his "Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau" (*i.e.*, the initial organizer and leader of the CFPB, prior to the appointment of a CFPB Director); in making that announcement, President Obama asserted that the CFPB would "crack down on the abusive practice of unscrupulous mortgage lenders," and that "[b]asically, the Consumer Financial Protection Bureau will be a watchdog for the American consumer, charged with enforcing the toughest financial protections in history."

90. Similarly, on the very day after the President's announcement of his appointment, CFPB Director Cordray gave a press conference at a think-tank in Washington, D.C., announcing that "[o]ur team is taking complaints about credit cards and mortgages, with other products to be added as we move forward," and that to act upon "outrageous" stories from mortgage borrowers and other named and unnamed members of the public "is exactly what the consumer bureau is here to do."

91. Similarly, in a March 14, 2012 address Director Cordray reiterated that the CFPB would continue to "address the origination of mortgages, including loan originator compensation and the origination of high-priced mortgages."

92. In each of these statements, and others, CFPB Director Cordray and other CFPB officials have validated and reinforced responsible lenders' reasonable fears that Title X empowers the CFPB to aggressively interpret its open-ended statutory mandate to retroactively punish good-faith consumer lending practices—which the CFPB can do because of the lack of checks and balances limiting the agency's discretion.

93. These and other statements justify the Bank's reasonable, good-faith concerns about the threat of liability established by the CFPB on a case-by-case, *ex post facto* basis.

94. Accordingly, in light of Title X's grant of effectively unlimited power to the CFPB, the Bank ceased its consumer mortgage lending operations on or about October 2010, and it continues to decline to re-enter the market for offering consumer mortgages, including mortgages with "balloon payments," as well as "character loans"—loans based not only on quantitative estimates of the borrower's ability to pay and the resale value of collateral property but also the borrower's known credibility and character—in light of the risks and uncertainty imposed by CFPB's unlimited powers and lack of checks and balances.

95. To re-enter the mortgage market would entail not just the aforementioned assumption of risk by the Bank, given the uncertain nature of CFPB enforcement and investigation under Title X, as well as the CFPB's ability directly and indirectly to influence the examinations and enforcement activities of the Office of the Comptroller of the Currency, but also the burdens of substantially increased compliance costs, as State National Bank of Big Spring—a small community bank—would be forced to constantly monitor and predict the CFPB's regulatory priorities and legal interpretations.

96. Furthermore, the Bank would be required to comply with the extensive mortgage disclosure rules the CFPB is poised to adopt. The CFPB recently promulgated a set of proposed

rules on mortgage disclosures. *See* Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 77 Fed. Reg. 51,116 (Aug. 23, 2012).

The CFPB's Other Substantive Powers

97. In addition to the CFPB's open-ended power to define and prosecute what it deems to be "unfair," "deceptive," or "abusive" practices, the CFPB also is empowered under Title X to enforce myriad pre-existing statutes, and to "supervise" certain classes of banks.

The CFPB's Authority To Administer Pre-Existing Statutes

98. The Act commits to the CFPB's jurisdiction myriad pre-existing "Federal consumer financial laws" heretofore administered by other executive or independent agencies.

99. Specifically, the Act authorizes the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws," including the power to promulgate rules "necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." Sec. 1011(a), 1022(b)(1).

100. According to Section 1002(12) & (14) of the Act, the "Federal consumer financial laws" include: the Alternative Mortgage Transaction Parity Act, of 1982, 12 U.S.C. § 3801 *et seq.*; the Consumer Leasing Act of 1976, 15 U.S.C. § 1667, *et seq.*; the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* (except with respect to section 920); the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*; the Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (except with respect to sections 615(e) and 628); the Home Owners Protection Act of 1998, 12 U.S.C. § 4901 *et seq.*; the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 *et seq.*; subsections (b) through (f) of section 43 of the Federal

Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f); sections 502 through 509 of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802-6809 (except section 505 as it applies to section 501(b)); the Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 *et seq*; the Homeownership and Equity Protection Act of 1994, 15 U.S.C. § 1601; the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*; the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. § 5101 *et seq.*; the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*; the Truth in Savings Act, 12 U.S.C. § 4301 *et seq.*; section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701; and several laws for which authority of enforcement is transferred to the CFPB, and rules or orders prescribed by the CFPB under its statutory authority.

101. Accordingly, the Dodd-Frank Act transfers to the CFPB authority over aspects of consumer financial products and services previously exercised by a range of other federal agencies—including the FRB, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the FDIC, the Federal Trade Commission, the National Credit Union Administration, and the Department of Housing and Urban Development.

102. The CFPB's interpretation of these existing statutes has already caused injury to State National Bank of Big Spring. On February 7, 2012, the CFPB published in the *Federal Register* its Final Rule with respect to international remittance transfers, pursuant to which the Bank's customers in the United States could send money to family members overseas. *See* Electronic Fund Transfers, 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). The Final Rule imposed substantial new disclosure and compliance requirements on the Bank, which increase the cost of providing these services to the Bank's customers to an unsustainable level. On May 23, 2012, the Bank's Board of Directors instituted a policy to cease

providing these remittance transfer services to its consumers because of the increased costs arising out of the CFPB's Final Rule.

103. The CFPB thus asserted and exercised authority to regulate the Bank's international wire transfers.

The CFPB's Supervisory Authority

104. Section 1024 of the Dodd-Frank Act vests the CFPB with exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports or issue exemptions with respect to covered non-depository institutions under the Federal consumer financial laws. Sec. 1024(d).

105. Section 1025 vests the CFPB with exclusive authority to require reports and conduct periodic examinations of insured depository institutions or credit unions with total assets of more than $10 billion and any affiliate thereof or service provider thereto. Sec. 1025(b), (d). Likewise, the Act vests the CFPB with primary authority to enforce Federal consumer financial laws with respect to insured depository institutions or credit unions with total assets of more than $10 billion and any affiliate thereof or service provider thereto. Sec. 1025(c).

106. The Dodd-Frank Act grants the FRB authority to delegate to the CFPB its authority to examine persons subject to the jurisdiction of the FRB for compliance with Federal consumer financial laws. Sec. 1012(c)(1). Once the FRB has delegated examination authority to the CFPB, the FRB may not intervene in any matter or proceeding before the Director, including examinations or enforcement actions, or appoint, direct, or remove any officer or employee of the CFPB, including the Director. *Id.*

107. Title X also gives the CFPB the authority to supervise an entity that: (1) offers or provides origination, brokerage, or servicing of consumer loans secured by real estate: (2) is a

"larger participant of a market for other consumer financial products or services;" (3) the CFPB determines after notice to the entity and opportunity for response may be engaging in conduct that poses risks to consumers with regard to the provision of consumer financial products or services; (4) offers to any consumer a private education loan; or (5) offers to a consumer a payday loan. Sec. 1024(a)(1).

Title X Grants The CFPB Aggressive Investigation And Enforcement Powers

108. Subtitle E of Title X of the Dodd-Frank Act sets forth the CFPB's enforcement authority. Section 1052 authorizes the CFPB to engage in investigations, to issue subpoenas for the attendance and testimony of witnesses and production of documents and materials, to issue civil investigative demands, and to commence judicial proceedings to compel compliance with those demands.

109. Section 1053 of the Dodd-Frank Act authorizes the CFPB to conduct hearings and adjudicative proceedings to ensure or enforce compliance with the Act, any rules promulgated thereunder, or any other Federal law the CFPB is authorized to enforce.

110. Subject to limitations described in other provisions of Title X, Section 1054 authorizes the CFPB to commence a civil action against any person whom it deems to have violated a Federal consumer financial law, and to seek all legal and equitable relief, including a permanent or temporary injunction, as permitted by law.

The Dodd-Frank Act Eliminates The Checks And Balances That Could Otherwise Limit The CFPB's Exercise of Those Broad, Undefined Powers

111. As noted above, in addition to granting the CFPB effectively unlimited rulemaking, enforcement, and supervisory powers over "unfair," "deceptive," or "abusive" lending practices, Title X of the Dodd-Frank Act also eliminates the Constitution's fundamental checks and balances that would ordinarily limit or channel the agency's use of that power.

Those checks and balances are necessary to prevent the CFPB from expansively and aggressively interpreting its open-ended mandate; the absence of those checks and balances, combined with the open-ended grant of power, constitutes a violation of the separation of powers.

112. First, Congress has no "power of the purse" over the CFPB, because the Act authorizes the CFPB to fund itself by unilaterally claiming funds from the FRB.

113. Specifically, the Director of the CFPB, who cannot be removed at the pleasure of the President, determines for himself the amount of funding the CFPB receives from the FRB; then the FRB must transfer those funds to the CFPB. Sec. 1017(a)(1).

114. The Act authorizes the CFPB to claim an increasing percentage of the Federal Reserve System's 2009 operating expenses, beginning in fiscal year 2011 at up to 10 percent of those expenses, and reaching up to 12 percent in fiscal year 2013 and thereafter. This amount will be adjusted for inflation. Sec. 1017(a)(2)(B).

115. Because the Federal Reserve System's 2009 operating expenses were $4,980,000,000, the CFPB Director will be empowered to unilaterally requisition up to $597,600,000 in 2013 and thereafter, adjusted for inflation. *See* Board of Governors of the Federal Reserve System, 96th Annual Report 491 (2009), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/annual09/pdf/ar09.pdf; *see also* CFPB, FY 2013 Budget Justification 7 (2012), *available at* http://files.consumerfinance.gov/f/2012/02/budget-justification.pdf.

116. In other words, the CFPB's automatic budget authority is nearly double the Federal Trade Commission's entire budget request to Congress for fiscal year 2013 (*i.e.*, $300

million). *See* FTC, Fiscal Year 2013 Congressional Budget Justification (2012), *available at* http://www.ftc.gov/ftc/oed/fmo/2013_CBJ.pdf.

117. In addition to allowing the CFPB to fund itself, Title X goes so far as to explicitly *prohibit* the House and Senate Appropriations Committees from even attempting to "review" the CFPB's self-funded budget. Sec. 1017(a)(2)(C).

118. Second, in addition to the Act's elimination of Congress's "power of the purse," the Act also insulates the CFPB Director from presidential oversight.

119. Specifically, once the CFPB Director is appointed by the President with the advice and consent of the Senate, Sec. 1011(b)(1)-(2), he receives a five-year term in office and may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." Sec. 1011(c)(2), (3).

120. The absence of this check is particularly significant because all of the powers of the Bureau are vested solely in the CFPB Director, without the moderating influence of other commissioners, officials, or governors on the decisions of the CFPB, as is the case with other administrative agencies that are vested with quasi-legislative and quasi-judicial powers.

121. The judicial branch's oversight power is also reduced, because the Dodd-Frank Act requires the courts to grant the same deference to the CFPB's interpretation of Federal consumer financial laws that they would "if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." Sec. 1022(b)(4)(B).

122. The CFPB's regulatory authority is further insulated from accountability to the very agency in which it is housed. Section 1012(c) provides that no rule or order promulgated by

the CFPB shall be subject to approval or review by the FRB, and that the FRB shall not delay or prevent the issuance of any rule or order promulgated by the CFPB.

123. In sum, Title X eliminates the fundamental checks and balances that would ordinarily serve to limit the CFPB's expansive interpretation of its open-ended statutory mandate against State National Bank of Big Spring and other responsible lenders. This violates the Constitution's separation of powers.

RICHARD CORDRAY'S APPOINTMENT AS CFPB DIRECTOR

124. The Private Plaintiffs allege as follows, with respect to the appointment of CFPB Director Richard Cordray:

125. Richard Cordray was appointed CFPB Director without the Senate's advice and consent, and without a Senate recess.

126. Specifically, on January 4, 2012, President Obama announced that he was using his "recess appointment" power to appoint Richard Cordray as the Director of the CFPB, an unconstitutional act that circumvented one of the only few remaining (and minimal) checks on the CFPB's formation and operation.

127. The appointment of Mr. Cordray is unconstitutional because the Senate was not in "recess," as required to give effect to the President's power to make recess appointments. This is so for at least three reasons:

128. First, the Constitution gives the Senate the exclusive power to determine its rules, and the Senate declared itself to be in session;

129. Second, the House of Representatives had not consented to a Senate adjournment of longer than three days, as it must to effect a recess;

130. And third, the Senate passed significant economic policy legislation during the session that the executive branch alleged to be a recess.

131. The Constitution gives the Senate the sole authority to declare when it is, and is not, in session, subject only to House consent. The Constitution expressly vests in each House of Congress the exclusive power to "determine the rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2.

132. As Senator Ron Wyden stated on the floor of the Senate on December 17, 2011, the Senate agreed by unanimous consent to continue its 111th Session from December 20, 2011 through January 3, 2012; and to begin its 112th Session on January 3, as required by Section 2 of the Twentieth Amendment to the United States Constitution, and continue that session at least through January 23, 2012. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011).

133. These sessions were substantive. For example, during these sessions Congress passed a major piece of economic policy legislation, perhaps President Obama's most significant legislative priority of the fall of 2011, the Temporary Payroll Tax Cut Continuation Act of 2011, by unanimous consent. *See* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Sen. Reid). The President signed the bill into law the next day. This decision to continue in session, rather than recess, was necessary to discharge the Senate's obligations under both the Twentieth Amendment and Article I, Section 5, Clause 4 of the Constitution, which prohibits one House of Congress from adjourning for more than three days without the consent of the other. The House of Representatives had not consented to adjournment.

134. The President's attempt to "recess"-appoint CFPB Director Cordray in this context was unprecedented and unconstitutional.

THE FINANCIAL STABILITY OVERSIGHT COUNCIL

135. The Private Plaintiffs allege as follows, with respect to the FSOC:

136. Title I of the Dodd-Frank Act establishes the FSOC, an interagency "council" with sweeping power and effectively unbridled discretion.

The Organization of FSOC

137. The FSOC is a 15-member body with broad executive powers. The FSOC is chaired by the Secretary of the Treasury. Its other nine voting members, under Section 111(b)(1), are:

- the Chairman of the Securities & Exchange Commission;
- the Chairman of the Commodities Futures Trading Commission;
- the Chairman of the FRB;
- the Chairman of the FDIC;
- the Comptroller of the Currency;
- the Director of the CFPB;
- the Director of the Federal Housing Finance Agency;
- the Chairman of the National Credit Union Administration Board; and
- an independent member appointed by the President having "insurance expertise."

138. In addition to the ten voting members, the FSOC also has five nonvoting members: the Director of the Office of Financial Research (a newly created office within the Department of the Treasury); the Director of the Federal Insurance Office; a state insurance commissioner; a state banking supervisor; and a state securities commissioner.

139. Of the non-voting members, no member of the Executive Branch of the federal government has a role in appointing the three state officials to the FSOC; rather, the state

officials are to be "designated" for two-year terms "by a selection process determined by the State insurance commissioners," "State banking supervisors," or "State securities commissioners," respectively. Sec. 111(b)(2), 111(c)(1).

140. Non-voting members of the FSOC cannot be excluded from any of the proceedings, meetings, discussions, or deliberations of the FSOC unless necessary to protect confidential supervisory information submitted by financial institutions to regulatory agencies. Sec. 111(b)(3).

The FSOC Has Effectively Unlimited Discretion To Pick Which Nonbank Financial Companies Are "Systemically Important"

141. By a two-thirds vote of the FSOC's voting members (with the affirmative vote of the Treasury Secretary), the FSOC may determine that a "U.S. nonbank financial company" could, if in distress, "pose a threat to the financial stability of the United States." Sec. 113(a).

142. As the FSOC (like countless commentators and analysts) recognizes, those determinations by the FSOC announce, in substance, that the designated nonbank financial companies "are, or are likely to become, *systemically important*." *See* 76 Fed. Reg. 64,264, 64,267 (Oct. 18, 2011) (emphasis added).

143. By designating a nonbank financial company as "systemically important," the FSOC subjects the company to the possibility of heightened federal oversight. *See* Sec. 115. But the designation also confers a substantial competitive advantage upon the selected company—and it imposes concomitant competitive disadvantage upon the company's competitors.

144. Specifically, financial companies that receive a "systemic importance" designation will be seen by the investing public as less risky (because they are seen as having the

implicit backing of the government), and therefore those companies will be able to attract capital—in terms of both debt and equity investment—at an artificially low rate.

145. The benefits awaiting FSOC-designated systemically important financial institutions ("SIFIs") are well documented in economic literature. Banks perceived by the public as "systemically important" (or, "too big to fail") enjoy a substantial advantage over their competitors in terms of their respective cost-of-capital. *See, e.g.*, David A. Price, "Sifting for SIFIs," Region Focus, Federal Reserve Bank of Richmond (2011), *available at* www.richmondfed.org/publications/research/region_focus/2011/q2/pdf/federal_reserve.pdf; Joseph Noss & Rhiannon Sowerbutts, *The Implicit Subsidy of Banks* 6 (Bank of England Financial Stability Paper No. 15, May 2012), *available at* http://www.bankofengland.co.uk/publications/Documents/fsr/fs_paper15.pdf.

146. Furthermore, this dynamic was illustrated by Defendant Bernanke in a March 2010 speech. Noting that "one of the greatest threats to the diversity and efficiency of our financial system is the pernicious problem of financial institutions that are deemed 'too big to fail,'" he warned that "if a firm is publicly perceived as too big, or interconnected, or systemically critical for the authorities to permit its failure, its creditors and counterparties have less incentive to evaluate the quality of the firm's business model, its management, and its risk-taking behavior. As a result, such firms face limited market discipline, allowing them to obtain funding on better terms than the quality or riskiness of their business would merit and giving them incentives to take on excessive risks."

147. Finally, Bernanke added that "[h]aving institutions that are too big to fail also creates competitive inequities that may prevent our most productive and innovative firms from prospering."

148. The FSOC's power to formally designate nonbank SIFIs will do for nonbanks what unofficial SIFI status long has done for unofficial SIFIs: give them a direct cost-of-capital subsidy not enjoyed by the other companies competing for scarce, fungible capital—such as Plaintiff State National Bank of Big Spring. Indeed, formal SIFI designations promulgated by the FSOC will enhance any direct cost-of-capital subsidy previously enjoyed by institutions considered by some in capital markets to enjoy unofficial SIFI status, by removing uncertainty as to the government's views on their SIFI status, and will extend this direct cost-of-capital subsidy to institutions not previously considered by those in capital markets to enjoy unofficial SIFI status.

149. Accordingly, Plaintiff State National Bank of Big Spring is injured by the FSOC's official designation of "systemically important" nonbank financial companies, because each additional designation will require the Bank to compete with yet another financial company—*i.e.*, a newly designated nonbank financial company—that is able to attract scarce, fungible investment capital at artificially low cost.

150. By former Treasury Secretary and Defendant Geithner's own admission, the FSOC's nonbank SIFI designations are imminent: On February 2, 2012, Secretary Geithner announced that, "[t]his year, the Council will make the first of these designations."

151. Despite all of the consequences riding upon the FSOC's determination, the Dodd-Frank Act gives the FSOC unlimited discretion in making those determinations.

152. After listing several broad standards for the FSOC to consider in making its determinations (*e.g.*, that the company's "scope, size, scale, concentration, interconnectedness, or mix of activities . . . could pose a threat to the financial stability of the United States," Sec. 113(a)(1)), Title I opens the door to unlimited other considerations by authorizing the FSOC to

consider "any other risk-related factors that [the FSOC] deems appropriate" in subjecting a company to this stringent oversight. Sec. 113(a)(2)(K).

153. Accordingly, the nominal standards prescribed by Title I of the Dodd-Frank Act impose no limits on the FSOC's designation of nonbank financial companies as "systemically important."

The FSOC's Determinations Are Not Subject To Meaningful Judicial Review

154. Because the FSOC has open-ended discretion to designate nonbank financial companies as systemically important, it is all the more important that the courts be available to review the FSOC's conclusions and analysis. But instead, Title I closes the courthouse doors to those who object to the FSOC's legal interpretations.

155. Specifically, a party designated by the FSOC as systemically important may appeal to federal district court, but its appeal is limited to the question of whether the FSOC's determination is "arbitrary and capricious." Sec. 113(h). Whereas courts are normally permitted to review administrative agency decisions to determine whether they are "in accordance with law," *cf.* 5 U.S.C. 706(2)(A), Section 113 eliminates this important judicial review criterion.

156. And even more importantly, Title I provides *no* right of judicial review for a third party—*i.e.*, State National Bank of Big Spring, or other market participants—to challenge the FSOC's systemic-importance designation of another company, even if the FSOC designation puts that third-party at a competitive disadvantage in terms of relative cost-of-capital.

157. Accordingly, even though the FSOC's determinations that certain nonbank financial companies are systemically important will place Plaintiff State National Bank of Big Spring at yet further competitive disadvantage, Title I denies it the right to challenge any aspect of the nonbanks' FSOC designation.

ORDERLY LIQUIDATION AUTHORITY

158. Title II of the Dodd-Frank Act empowers the Treasury Secretary and the FDIC to entirely liquidate a financial company and to pick and choose favorites among creditors in the liquidation process.

159. Upon a two-thirds vote of the FRB and the FDIC Board, these two agencies may recommend to the Secretary of the Treasury that the Secretary initiate a process through which a financial company is entered into FDIC receivership and ultimately liquidated.

160. The Secretary may initiate the Orderly Liquidation Authority if he finds:

(1) the financial company is "*in default* or *in danger of default*";

(2) the company's failure and resolution would "have *serious adverse effects* on *financial stability* in the United States";

(3) "no *viable* private sector alternative is *available* to prevent the default of" the company;

(4) the effects of this action on the interests of creditors, counterparties, and shareholders are "*appropriate*" given the impact any action taken under the Act would have on financial stability in the United States;

(5) action taken under Title II would avoid or mitigate adverse effects on creditors;

(6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to regulatory order; and

(7) the company is a financial company as defined in § 201 of the Act.

Sec. 203(b) (emphasis added).

161. These standards offer no meaningful or enforceable limits or direction. None of the italicized terms in the previous paragraph is defined in the Dodd-Frank Act.

162. The Treasury Secretary can liquidate a financial company under Title II even if the company was not previously designated by the FSOC as "systemically important." *See* Sec. 201(a)(11)(A) (defining "financial company" for purposes of Sec. 203(b) liquidation determination).

163. While Title II speaks of "orderly liquidation," the FDIC's powers and discretion are vastly broader than simply winding down the company:

164. First, the FDIC may merge the company with another company, or sell substantially all of the company's assets, "without obtaining any approval, assignment, or consent[.]" Sec. 210(a)(1)(G).

165. Second, the FDIC can also transfer assets and claims to a "bridge financial company" owned and controlled by the FDIC, with virtually unlimited discretion. Sec. 210(h)(1)(A).

166. Third, the FDIC is permitted to repudiate any contract it views as "burdensome." Sec. 210(c)(1).

167. Finally, the FDIC is given blanket authority to "take any action" it chooses to treat similarly-situated creditors differently, if the FDIC determines that disparate treatment is necessary to "initiate and continue operations essential to implementation of the receivership or any bridge financial company," to maximize the value of the liquidated company's assets, to "maximize the present value return from the sale or other disposition of the assets of the covered financial company," or to "minimize the amount of any loss realized upon the sale or other disposition of" the liquidated company's assets. Sec. 210(b)(4).

168. As such, the Orderly Liquidation Authority involves the "adjustment of a [potentially] failing debtor's obligations," "includes the power to discharge the debtor from his contracts and legal liabilities," and governs the relations between a potentially insolvent debtor and his creditors. *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (internal quotation marks omitted). Title II thus constitutes an exercise of Congress's power under the Bankruptcy Clause.

169. Each of the plaintiff States has invested in, and is a creditor of, either directly or through the State's pension fund(s), financial companies that are subject to resolution under the Orderly Liquidation Authority. *See* Exhibits A-K.

170. On its face, Section 210(b)(4) of the Act abrogates the rights under the U.S. Bankruptcy Code of creditors of institutions that could be liquidated, destroying a valuable property right held by creditors—including the State Plaintiffs—under bankruptcy law, contract law, and other laws, prior to the Dodd-Frank Act. Section 210(b)(4) exposes those creditors to the risk that their credit holdings could be arbitrarily and discriminatorily extinguished in a Title II liquidation, and without notice or input. Title II's destruction of a property right held by each of the State Plaintiffs harms each State, and is itself a significant, judicially cognizable injury that would be remedied by a judicial order declaring Title II unconstitutional.

171. In addition to destroying the State Plaintiffs' valuable property rights, Title II exposes the State Plaintiffs to a present and ongoing substantial risk of direct economic harm, in the event of the Treasury Secretary's and FDIC's liquidation of a financial company for which a State Plaintiff is a creditor. Such a liquidation can happen at any time, and would happen without advance warning; indeed, the State Plaintiffs would be barred, as a matter of law, from being told of the liquidation until after the Treasury Secretary's liquidation order goes into effect.

Thus, the State Plaintiffs would not have any adequate opportunity to raise a constitutional challenge to protect their interests in the event an orderly liquidation occurred.

172. For creditors who, like the State Plaintiffs, invest in the debt of multiple financial institutions, the Dodd-Frank Act's elimination of creditor rights is all the more injurious, as it multiplies the risk that a creditor will realize actual financial loss in a liquidation under Title X: Even assuming *arguendo* that there is a relatively low risk that any single financial company will someday be liquidated, States invested in the debt of many financial companies face the aggregate risk that any one of those companies could be liquidated.

Judicial Review of The Treasury Secretary's Liquidation Decision Is Subject to Draconian Limits

173. Despite Title II's grant of vast authority to the Treasury Secretary, Title II severely limits judicial oversight of the Secretary's exercise of his powers under the Orderly Liquidation Authority.

174. When the targeted company refuses to acquiesce to the Treasury Secretary's determination that the company shall be liquidated under Title II, the Treasury Secretary enforces his decision by petitioning the U.S. District Court for the District of Columbia for an order affirming his decision.

175. This judicial review is subject to draconian limitations that render it little more than a rubber stamp:

176. First, upon the filing of the petition by the Treasury Secretary, the District Court must conduct a hearing and issue a final decision on the merits "within *24 hours* of receipt of the petition." Sec. 202(a)(1)(A)(v) (emphasis added).

177. Second, the hearing must be conducted "[o]n a strictly confidential basis, and without any prior public disclosure," depriving the public (including creditors) of the

transparency of the judicial system and the ability to participate in the limited judicial process provided for in Title II. Sec. 202(a)(1)(A)(iii).

178. Third, Title II of the Dodd-Frank Act severely limits the *scope* of judicial review available. The District Court deciding the Treasury Secretary's Title II liquidation petition may review only the Secretary's findings that (1) the company is a "financial company" and (2) the company "is in default or in danger of default." Sec. 202(a)(1)(A)(iii). The Court is accordingly *prohibited* from reviewing five of the seven factors upon which the lawfulness of the Secretary's decision turns. A company subject to the Secretary's Title II liquidation decision has no right to mount any challenge to the Secretary's determination that its default would "have serious adverse effects on financial stability in the United States," that "no viable private sector alternative is available to prevent the default of" the company; or that the effects of the Secretary's decision on the interests of creditors, counterparties, and shareholders are "appropriate." *See* Sec. 203(b). Thus, a company challenging the Secretary of the Treasury's decision cannot argue that the Secretary's decision violated or misinterpreted the law.

179. Fourth, with respect to the only two determinations that the District Court may review, the Court is limited to considering whether the Secretary's decision was arbitrary and capricious. Sec. 202(a)(1)(A)(iii).

180. Fifth, if the District Court fails to overturn the Secretary's decision within the limited 24-hour period provided for in the Act, the Secretary's petition is "granted by operation of law." Sec. 202(a)(1)(A)(v).

181. Sixth, appellate review is limited. The U.S. Court of Appeals for the District of Columbia Circuit is confined to the same narrow arbitrary and capricious review that binds the District Court's review of the Secretary's liquidation decision.

182. Seventh, the company to be liquidated may not secure a stay of the Secretary's decision, or the FDIC's receivership activities, while the appeal is pending. It is entirely possible, perhaps even likely, that the FDIC will complete liquidation of the company, thereby mooting the appellate court's review, before the D.C. Circuit can reach a decision on the merits. Sec. 202(a)(1)(B).

183. Furthermore, the draconian limits on a liquidated company's right of judicial review pale in comparison to the limits imposed on the *creditors'* right to judicial-review: creditors enjoy *no* right to judicial review of the Treasury Secretary's liquidation determination under Title II.

184. Indeed, Local Civil Rule 85 of the U.S. District Court for the District of Columbia, promulgated for the specific purpose of governing judicial review of Title II liquidation determinations, makes *no* allowance for participation by third parties in contested Title II proceedings; rather, the District Court will adjudicate the matter "on a confidential basis and without public disclosure" as prescribed by the Dodd-Frank Act. Local Civ. R. 85(g).

185. Because a Title II proceeding is subject to mandatory secrecy, Sec. 202(a)(1)(A)(iii), creditors will not know of a contested liquidation determination until the 24-hour district court proceedings are complete.

186. And because a company may simply choose to accept the Treasury Secretary's Title II liquidation determination—indeed, a company may in fact *request* liquidation—that company's creditors will have *no* opportunity to contest a "friendly" liquidation, even if that liquidation subjects the creditor to the immediate risk of financial loss.

187. Accordingly, as creditors, the States of Alabama, Georgia, Kansas, Michigan, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and West Virginia would have no

right or opportunity to intervene in the 24-hour district court review of a Treasury Secretary's contested liquidation determination, nor any right or opportunity to file their own judicial challenges to a liquidation.

188. Moreover, Title II eliminates the remedy ordinarily available to persons whose property rights are confiscated by the Government—*i.e.*, the Tucker Act, 28 U.S.C. § 1491. Title II caps the possible compensation available to aggrieved parties at artificially low levels. Sec. 210(d)-(e).

189. In sum, by authorizing the Treasury Secretary to order the liquidation of a company not in default, yet requiring the courts to calculate compensation in light of a purely hypothetical default scenario, Title II presents a substantial likelihood that the aggrieved creditors' ultimate cash recovery will not be "the full and perfect equivalent in money of the property taken," *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 150 (1973) (quotation omitted), but rather a cash recovery "close to zero," Douglas G. Baird & Edward R. Morrison, *Dodd-Frank for Bankruptcy Lawyers*, 19 Am. Bankr. Inst. L. Rev. 287, 316 (2011).

Orderly Liquidation Is Not Subject To Congress's "Power of the Purse"

190. The Dodd-Frank Act establishes an "Orderly Liquidation Fund" ("OLF") to fund the FDIC's operations as receiver—including orderly liquidation of covered financial companies, payment of administrative expenses, and the payment of principal and interest by the FDIC on debt it issues to cover shortfalls. Sec. 210(n).

191. Once the Treasury Secretary has designated a company for FDIC receivership, the FDIC funds its support and management of the company through the OLF. Sec. 210(n).

192. The Dodd-Frank Act insulates the Orderly Liquidation Authority from the appropriations process by providing that "[a]ll funds expended in the liquidation of a financial

company under this title shall be recovered from the disposition of assets of such financial company," or shall be recouped via assessments on other financial companies. Sec. 212(b).

193. The Dodd-Frank Act contemplates that if the assets of a company being liquidated are insufficient to cover the costs of the company's liquidation, the FDIC can incur debt obligations, which it would later repay through assessments on the financial-services industry. Specifically, the FDIC is authorized to borrow money from the Treasury, but must repay that amount by levying "assessments" on the company's creditors, and, if necessary, bank holding companies and nonbank financial companies designated by the FSOC as systemically risky. Sec. 210(n), (o). Neither the issuance of debt nor the levy of assessment requires Congressional approval. Sec. 210(o).

194. By funding the Orderly Liquidation Authority outside of the normal appropriations process, the Dodd-Frank Act limits legislative oversight of the liquidation authority.

COUNT I
(Violation of the Separation of Powers – Title X)

195. The Private Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs.

196. The Constitution provides that all "legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

197. The Constitution further provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law..." U.S. Const. art. I, § 9.

198. Furthermore, the Constitution provides that the "executive Power shall be vested in a President," U.S. Const. art. II, § 1, and that "he shall take Care that the Laws be faithfully

executed," U.S. Const. art. II, § 3. Those provisions vest all executive power, including the power to enforce the law, in the President of the United States.

199. By delegating effectively unlimited power to the CFPB, by eliminating Congress's own "power of the purse" over the CFPB, by eliminating the President's power to remove the CFPB Director at will, and by limiting the courts' judicial review of the CFPB's actions and legal interpretations, Title X of the Dodd-Frank Act violates the Constitution's separation of powers.

200. Neither Congress nor the President can negate those structural constitutional requirements by signing or enacting (and thereby acceding to) Title X. "Perhaps an individual President"—or Congress—"might find advantages in tying his own hands," the Supreme Court recently noted, "[b]ut the separation of powers does not depend on the views of individual Presidents"—or particular Congresses. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010). The Constitution's separation of powers does not depend "on whether 'the encroached-upon branch approves the encroachment.'" *Id.* (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

201. Neither the President nor Congress may "choose to bind [their] successors by diminishing their powers, nor can [they] escape responsibility for [their] choices by pretending that they are not [their] own." *Id.*

202. "The diffusion of power" away from Congress and the President, to the independent CFPB, "carries with it a diffusion of accountability. . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.* (quoting The Federalist No. 70, p. 476 (J. Cooke ed. 1961) (A. Hamilton).

203. While the Supreme Court has approved the constitutionality of certain removals of checks or balances in *isolation*—*e.g.*, a limit on the President's power to remove certain officers—the Court has never held that it is constitutional to remove all of the checks and balances that Title X removes, *and* to combine that lack of checks and balances with the open-ended statutory powers that Title X provides the CFPB—thereby effectively granting unlimited discretion to the agency.

204. And so while the Supreme Court has "previously upheld limited restrictions on" individual checks and balances, the CFPB's "novel structure does not merely add to the [CFPB's] independence, but transforms it." *Free Enter. Fund*, 130 S. Ct. at 3154.

205. Accordingly, Title X's delegation of unlimited power to the CFPB, together with the Title X's elimination of the necessary checks and balances upon the CFPB's exercise of that power, is unconstitutional, must be declared unconstitutional, and must be enjoined.

206. Because the Bank is directly subject to the CFPB's authority, Title X's violation of the separation of powers creates a "here-and-now" injury entitling the Bank to judicial review to ensure that the standards to which it is subject "will be enforced only by a constitutional agency accountable to the Executive." *Free Enter. Fund*, 130 S. Ct. at 3164 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

COUNT II
(Appointments Clause - CFPB)

207. The Private Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs.

208. President Obama's appointment of Defendant Cordray as director of the CFPB violates the Appointments Clause of the Constitution. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for." U.S. Const. art. II, § 2, cl. 2.

209. The CFPB possesses significant powers over the market for consumer financial products and services and participants in that market including (but not limited to) issuing rules, orders and guidance implementing federal consumer financial law and supervising covered persons for compliance with federal consumer financial law. The CFPB Director is authorized to employ personnel as may be deemed necessary to carry out the business of the CFPB. It is the Director of the CFPB who has ultimate authority to exercise any power vested in the CFPB under law, and the Director may delegate such authority to any duly authorized employee, representative, or agent. The CFPB Director is an Officer of the United States and, indeed, a principal Officer of the United States.

210. The Constitution expressly vests in each House of Congress the exclusive power to "determine the rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2.

211. As discussed above, on December 17, 2011, the Senate voted by unanimous consent to remain in session during the period between December 20, 2011 and January 23, 2012. The Senate's schedule provided for a series of sessions, and the *Congressional Record* indicates that those sessions actually occurred. *See* 153 Cong. Rec. S1 (Jan. 3, 2012), S3 (Jan. 6, 2012), S5 (Jan. 10, 2012), S7 (Jan. 13, 2012), S9 (Jan. 17, 2012), S11 (Jan. 20, 2012).

212. During these sessions, Congress passed the Temporary Payroll Tax Cut Continuation Act of 2011 on December 23, 2011. President Obama signed that legislation, never protesting that it was invalidly enacted due to a congressional recess.

213. The Constitution requires that "[n]either House, during the [s]ession of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. The House of Representatives never consented to a Senate adjournment of longer than three days, as it must to effect a recess.

214. Because the Senate, by its own vote, pursuant to its own actions, and based on the inaction of the House of Representatives, was in session when President Obama nominated Mr. Cordray to the position of CFPB Director, and because the President nonetheless did not secure its "advice and consent" for the Cordray nomination, Mr. Cordray's appointment to the CFPB is unconstitutional.

215. Because the Bank is directly subject to the CFPB Director's authority, the unconstitutional appointment of the CFPB Director creates a "here-and-now" injury entitling the Bank to judicial review to ensure that the standards to which it is subject "will be enforced only by a constitutional agency accountable to the Executive." *Free Enter. Fund*, 130 S. Ct. at 3164 (quoting *Bowsher*, 478 U.S. at 727 n.5).

COUNT III
(Separation of Powers – Title I)

216. The Private Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs.

217. The Constitution provides that all "legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. 1, § 1.

218. Furthermore, the Constitution provides that the "executive Power shall be vested in a President," U.S. Const. art. II, § 1, and that "he shall take Care that the Laws be faithfully

executed," U.S. Const. art. II, § 3. Those provisions vest all executive power, including the power to enforce the law, in the President of the United States.

219. Title I of the Dodd-Frank Act grants the FSOC effectively unlimited power, and eliminates the judiciary's ability to exercise meaningful judicial review of the FSOC's execution of that power—especially in cases where a competitor of the FSOC-designated company seeks to challenge the designation.

220. In addition to vesting executive power in the President, the Constitution also mandates that he, or the heads of executive departments, "shall appoint" all "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. But the FSOC includes non-voting members, such as insurance and banking officials, who are not appointed by the President or anyone in the executive branch, yet participate in its deliberations and proceedings. *See* Sec. 111(b)(2),(c)(1); ¶¶ 122-124, *supra*. For all of these reasons, Title I of the Dodd-Frank Act violates the Constitution's separation of powers.

221. As set forth in ¶¶ 119-141, *supra*, Congress cannot negate those structural constitutional requirements by enacting (and thereby acceding to) Title I. "The [Constitution's] separation of powers does not depend" on whether "'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 130 S. Ct. at 3155 (quoting *New York*, 505 U.S. at 182). Congress may not "choose to bind [its] successors by diminishing their powers, nor can [it] escape responsibility for [its] choices by pretending that they are not [its] own." *Id.*

222. "The diffusion of power" away from Congress, to the independent FSOC, "carries with it a diffusion of accountability. . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or

series of pernicious measures ought really to fall." *Id.* (quoting The Federalist No. 70, p. 476 (J. Cooke ed. 1961) (A. Hamilton)).

223. Title I's open-ended grant of power and discretion to the FSOC, combined with the elimination of the indispensable check of judicial review on the FSOC's judgments, and the inclusion of members who are neither appointed by the President nor confirmed by the Senate, gives the FSOC unfettered discretion in determining which nonbank financial companies will be designated "systemically important." That structure "does not merely add to the [FSOC's] independence, but transforms it." *Free Enter. Fund*, 130 S. Ct. at 3154.

224. Accordingly, Title I of the Dodd-Frank Act, violates the Constitution's separation of powers, must be declared unconstitutional, and must be enjoined.

225. Judicial review is necessary to prevent imminent injury to the Bank, which suffers competitive harm each time the FSOC designates any institution that competes with it for capital as "systemically important."

COUNT IV
(Separation of Powers – Title II)

226. The Private Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs; the State Plaintiffs reallege and incorporate by reference the allegations contained in ¶¶ 4, 9-13, 23-50, and 142-178, with respect to Title II of the Dodd-Frank Act.

227. The Constitution provides that all "legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. 1, § 1.

228. The Constitution further provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7.

229. The Constitution also provides that the "executive Power shall be vested in a President," U.S. Const. art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. Those provisions vest all executive power, including the power to enforce the law, in the President of the United States.

230. In addition, the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

231. As set forth above, Title II of the Dodd-Frank Act delegates effectively unlimited power to the Treasury Secretary to determine that a company should be liquidated under the Orderly Liquidation Authority and to the FDIC in carrying out that liquidation.

232. Furthermore, Title II eliminates all meaningful checks upon and balances against the power granted to the Treasury Secretary and the FDIC. Congress wields no power of the purse over Title II proceedings, and the President cannot terminate the FDIC's proceedings.

233. In addition, judicial review of the Treasury Secretary's determinations either is subject to draconian limitations (in the case of the 24-hour proceedings available for a company contesting its own liquidation) or is prohibited altogether (with respect to five of the seven factors on which the lawfulness of the Secretary's action turns and in the case of a creditor seeking to intervene in a contested liquidation determination or to protest a "friendly" liquidation).

234. With respect to the creditors of liquidated companies, Title II not only prohibits judicial review of the Treasury Secretary's liquidation determination; it also restricts judicial review of the FDIC's compensation determination.

235. Accordingly, Title II's delegation of authority to the Treasury Secretary and FDIC, with the accompanying elimination of checks and balances, violates the Constitution's separation of powers.

236. As set forth in ¶¶ 142-178, *supra*, Congress cannot negate those structural constitutional requirements by enacting (and thereby acceding to) Title II. The Constitution's separation of powers does not depend "on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 130 S. Ct. at 3155.

237. Congress may not "choose to bind [its] successors by diminishing their powers, nor can [they] escape responsibility for [its] choices by pretending that they are not [its] own." *Id.*

238. "The diffusion of power" away from Congress, to the Treasury Secretary and independent FDIC, "carries with it a diffusion of accountability. . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.* (quoting The Federalist No. 70, p. 476 (J. Cooke ed. 1961) (A. Hamilton).

239. While the Supreme Court may have approved the constitutionality of any single removal of a check or balance in isolation—*e.g.*, a limit on the Congress's power of the purse—the Court has never approved all of Title II's delegations, and eliminations of checks and balances, in a single law. In particular, the Supreme Court has never sustained the constitutionality of a statute that prohibits any meaningful judicial review of the Government's action in the manner of Title II of the Dodd-Frank Act. Title II's combinations of delegations, and eliminations of checks and balances, is unprecedented and unconstitutional. *Cf. Free Enter. Fund*, 130 S. Ct. at 3153 ("we have previously upheld limited restrictions on the President's

removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. . . . This novel structure does not merely add to the Board's independence, but transforms it.")

240. Accordingly, Title II's delegation of unlimited power to the Treasury Secretary and FDIC, with the elimination of meaningful judicial review of the execution of that power, violates the separation of powers, must be declared unconstitutional, and must be enjoined.

241. Judicial review is necessary to restore the rights of the State Plaintiffs and other creditors that previously existed under bankruptcy law and other laws but that were nullified by Title II.

242. Review is also necessary to prevent the States from suffering sudden financial losses in liquidation for which they would not receive prior notice.

243. The State Plaintiffs are entitled to "special solicitude" with respect to their standing to challenge Title II's nullification of their rights. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

COUNT V
(Due Process – Title II)

244. The Private Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs; the State Plaintiffs reallege and incorporate by reference the allegations contained in ¶¶ 4, 9-13, 23-50, 142-178, and 210-227, with respect to Title II of the Dodd-Frank Act.

245. As set forth above, Title II of the Dodd-Frank Act delegates effectively unlimited power to the Treasury Secretary to determine that a company should be liquidated under the Orderly Liquidation Authority, and to the FDIC to choose favorites among similarly situated creditors in carrying out that liquidation.

246. In addition, judicial review of the Treasury Secretary's determinations either is subject to draconian limitations (in the case of the 24-hour proceedings available for a company contesting its own liquidation) or is prohibited altogether (with respect to five of the seven factors on which the lawfulness of the Secretary's action turns and in the case of a creditor seeking to intervene in a contested liquidation determination or to protest a "friendly" liquidation).

247. With respect to the creditors of liquidated companies, Title II not only prohibits judicial review of the Treasury Secretary's liquidation determination; it also restricts judicial review of the FDIC's compensation determination.

248. Title II thus fails to provide both companies facing liquidation and their creditors, all of whom are likely to have their property taken during the course of a liquidation, the "notice and a meaningful opportunity to be heard" that is the "core of due process." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

249. Accordingly, Title II's delegation of unlimited power to the Treasury Secretary and FDIC, without meaningful judicial review of the execution of that power, violates the Due Process Clause, must be declared unconstitutional, and must be enjoined.

COUNT VI
(Bankruptcy Uniformity – Title II)

250. The Private Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs; the State Plaintiffs reallege and incorporate by reference the allegations contained in ¶¶ 4, 9-13, 23-50, 142-178, and 210-232, with respect to Title II of the Dodd-Frank Act.

251. As set forth above, Title II of the Dodd-Frank Act delegates effectively unlimited power to the Treasury Secretary to determine that a company should be liquidated under the

Orderly Liquidation Authority, and to the FDIC to choose favorites among similarly situated creditors in carrying out that liquidation. Title II constitutes an exercise of Congress's power under the Bankruptcy Clause.

252. Furthermore, Title II eliminates all meaningful checks upon and balances against the Treasury Secretary's determinations and the FDIC's actions. Congress wields no power of the purse over Title II proceedings; the President cannot terminate the FDIC's proceedings. In addition, judicial review of the Treasury Secretary's determinations either is subject to draconian limitations (in the case of the 24-hour proceedings available for a company contesting its own liquidation) or is prohibited altogether (with respect to five of the seven factors on which the lawfulness of the Secretary's action turns and in the case of a creditor seeking to intervene in a contested liquidation determination or to protest a "friendly" liquidation).

253. Title II thus authorizes the Treasury Secretary and the FDIC to craft from whole cloth a new regime for liquidating each company subjected to the Orderly Liquidation Authority. Title II empowers the executive to decide not only whether a company will be subjected to that authority in the first instance but also which creditors will be favored among others in the liquidation process, and it provides for no meaningful limits on, or review of, the executive's exercise of discretion in either regard. The "orderly liquidation" authority thereby allows similarly situated creditors to be treated completely differently based on the whim of the executive, without any advance warning or meaningful constraints.

254. With respect to the creditors of liquidated companies, Title II not only prohibits judicial review of the Treasury Secretary's liquidation determination; it also restricts judicial review of the FDIC's compensation determination.

255. Title II's delegation of unlimited power to the Treasury Secretary and the FDIC, without meaningful judicial review of the execution of that power, constitutes a non-uniform law of bankruptcy that must be declared unconstitutional and must be enjoined.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

256. The Private Plaintiffs pray for an order and judgment declaring unconstitutional the provisions of the Act creating and empowering the CFPB, and enjoining Defendants Cordray and the CFPB from exercising any powers delegated to them by Title X of the Act;

257. The Private Plaintiffs pray for an order and judgment declaring unconstitutional Richard Cordray's appointment as CFPB director, and enjoining Cordray from carrying out any of the powers delegated to the office of CFPB Director by the Act;

258. The Private Plaintiffs pray for an order and judgment declaring unconstitutional the provisions of the Act creating and empowering the FSOC, and enjoining Defendants from exercising any powers delegated to them by Title I of the Act;

259. Plaintiffs pray for an order and judgment declaring unconstitutional the provisions of the Act creating and empowering the Orderly Liquidation Authority, and enjoining Defendants from exercising any powers delegated to them by Title II of the Act;

260. Plaintiffs pray for costs and attorneys' fees pursuant to any applicable statute or authority; and

261. Plaintiffs pray for any other relief this Court deems just and appropriate, to remedy the Plaintiffs' respective claims.

Dated: February 13, 2013

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AG challenging feds: West Virginia's attorney general is joining other states that are challenging a section of federal bankruptcy law.

Attorney General Patrick Morrisey has also filed a friend of the court brief in the U.S. Supreme Court challenging New York's tough new gun law.

The bankruptcy challenge involves the Dodd-Frank Act. A section of the law allows the federal government to decide which of a bankrupt company's creditors to bail out.

Morrisey said West Virginia holds investments in many institutions that could be covered by the so-called bail-out provision.

Morrisey also has announced West Virginia is joining 19 other states to challenge a section of the New York gun law that requires residents to show a particular need before they can obtain a concealed weapons permit.

In other Morrisey news, his solicitor general is taking a new title until he gets his West Virginia law license.

A former D.C. lawyer, Elbert Lin for now holds the title senior assistant to the attorney general. Morrisey's office reports Lin is "in the process of applying" for a West Virginia license. Lin makes $132,000 a year.

No. 12-845

In The Supreme Court of the United States

ALAN KACHALSKY, *et al.*,

Petitioners,

v.

SUSAN CACACE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, MICHIGAN, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY OF AMICI TO FILE[1]

The Commonwealth of Virginia, pursuant to Sup. Ct. R. 37(2)(a), and other States, file this Amicus Brief in support of the Petitioners' petition for a writ of certiorari because N.Y. Penal Law § 400.00(2)(f), improperly trenches upon the Second Amendment. The Amici have an interest in this Court holding that the self-defense interest animating the Second Amendment's individual right to keep and bear arms applies broadly beyond the confines of an individual's home and that no government may condition the exercise of this constitutional right on a ex ante showing of cause. Because this Court's interpretation of the federal constitutional right will affect the constitutional rights of Amici States' citizens with regard to the federal government and with regard to other States as they travel, the Amici States urge this Court to interpret the scope of the right and to apply a standard of review to its infringement that will recognize the inherent right of all citizens of the United States to "bear arms" and so lawfully and effectually protect themselves from unlawful violence.

United States Supreme Court Rule 37(4) authorizes State Attorneys General to file as amici on

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[1] On January 23, 2013, counsel of record for petitioners and respondents received timely notice of Amici States' intent to file this brief to which each consented. Sup. Ct. R. 37(2)(a).

behalf of their State without consent of the parties or further leave of this Court.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The petition places before the Court multiple issues central to the practical import of the individual right of self-defense protected by the Second Amendment. On these matters, the courts of appeals and other courts are divided, including on whether the Second Amendment's right to bear arms extends to areas outside the home. *See* (Pet. 12-13, nn.3-4, 18 n.6). These issues bear on a fundamental aspect of the liberty interest. *See District of Columbia v. Heller*, 554 U.S. 570, 606 (2008) (quoting St. George Tucker's notes on the Second Amendment in his "version of Blackstone's Commentaries" to the effect that the right is "'the true palladium of liberty. . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.'"); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038 (2010) (citing a similar statement in Justice Joseph Story's *Commentaries on the Constitution of the United States*). The right to keep and bear arms

continues to be popularly understood as central to the continuation of a free society. Rasmussen Reports, *65% see gun rights as protection against tyranny*, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control/65_see_gun_rights_as_protection_against_tyranny_control/65_see_gun_rights_as_protection_against_tyranny (Jan. 18, 2013).

Nevertheless, a handful of States like New York have lost sight of the Amendment's "guarantee [to] the individual [of the] right to possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, even imposing some outright bans. *See* D.C. Code §§ 22-4504 to -4504.02; 720 Ill. Comp. Stat. 5/24-1(a)(4); *cf. Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding Illinois' ban on carrying handguns in public to violate the Second Amendment). New York's brand of animus to Second Amendment rights also has been enacted by the States of California, Cal. Penal Code § 26150(a) (requiring, inter alia, "good cause"), Maryland, Md. Code Ann., Pub. Safety § 5-306(a)(1)-(5) (requiring, inter alia, "good and substantial reason"), and New Jersey, N.J. Stat. Ann. § 2C:58-4(c) (requiring, inter alia, a "justifiable need"), all of which are in litigation. *See McKay v. Hutchens*, No. 12-57049 (9th Cir.) (notice of appeal filed November 9, 2012); *Muller v. Maenza*, No. 12-1550 (3d Cir.) (awaiting oral argument); *Woollard v. Gallagher*, No. 12-1437 (4th Cir.) (argued October 24, 2012).

In the wake of the Seventh Circuit's decision in *Moore*, Illinois is being counseled to follow New York's

standard as well. *See Editorial: Madigan Should Appeal Gun Ruling*, Chicago Sun-Times, Dec. 11, 2012, *available at* http://www.suntimes.com/opinions/16952377-474/editorial-madigan-should-appeal-gun-ruling.html ("the Legislature could consider a narrowly crafted law, such as that in New York, which has concealed carry in theory but does not grant many permits."). The petition thus presents the Court with an excellent vehicle to resolve two of the most contested aspects of Second Amendment jurisprudence: (1) whether its protections apply with equal force outside the home, and (2) whether governments may condition the right of persons that are law-abiding upon a demonstration of particular "need."

Not only does a need to exercise a right requirement uniquely treat Second Amendment rights as disfavored, the New York requirement considers the self-defense component of those rights as being of a lower order than "carry[ing] a handgun for target practice or hunting." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). (App. 3, 9.)

Furthermore, the Second Circuit did not employ a meaningful standard of review. In view of the less-restrictive alternatives available to New York to address safety concerns, demonstrated by the experience of a majority of the States who have honored their citizens' self-defense rights, and by empirical research showing that right-to-carry laws do not result in criminal violence or public safety lapses, respondents cannot carry their burden to justify New York's broad

restriction. Hence, the judgment of the Second Circuit should be reviewed and reversed.

ARGUMENT

I. The Second Circuit's Categorical Distinction Between Bearing Arms Outside the Home and Keeping Arms Within the Home Finds No Support in the Constitution's Text, Breaks with This Court's Recognition that the Second Amendment Enshrines a Right to Self-Defense, and Conflicts with the Holding of the Seventh Circuit and Other Courts that the Right to Bear Arms Outside the Home Enjoys Robust Second Amendment Protection.

The Second Amendment *reads*: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep *and bear* Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). As this Court noted in *Heller*, "[i]n interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Heller*, 554 U.S. at 576 (citation omitted). The conjunctive "and" leaves no room for decoupling the right "to keep" from the right "to bear" or in affording categorically less protection to the latter activity. *Id.* at 592 (the Second Amendment "guarantee[s] the individual right to possess and carry weapons

in case of confrontation."); *id.* at 584 ("At the time of the founding, as now, to 'bear' meant to 'carry.' "); *cf. Moore*, 702 F.3d at 936 ("[c]onfrontations are not limited to the home," and the Second Amendment applies with equal force to "a loaded gun outside the home"). Thus, the Second Circuit's holding that handgun carry in public by law-abiding citizens "falls outside the core Second Amendment protections," *Kachalsky*, 701 F.3d at 94 (App. 26), conflicts with both the reasoning of this Court in *Heller*, 554 U.S. at 592, and *McDonald*, 130 S. Ct. at 3044, as well as the reasoning of the Seventh Circuit, *Moore*, 702 F.3d at 937 ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald.*"), and so merits this Court's review. *See* Sup. Ct. R. 10(a) and (c).

This petition also presents the Court with a court of appeals adopting a construction of the Second Amendment that would render nugatory a "right of the people" by excessively deferring to the transitory policy determinations of the people's current representatives with respect to the right's effect on "public safety and crime prevention." *Kachalsky*, 701 F.3d at 98; *see McDonald*, 130 S. Ct. at 3045 (plurality opinion) (rejecting "public safety" arguments against incorporation of the Second Amendment); *Heller*, 554 U.S. 570. (App. 33.) Accordingly, the Court should grant this petition and again reject any construction of its protections that permits a government to deny a particular law-abiding citizen, objectively competent in the use of arms, the right "to bear arms" for defense.

Compare Heller, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."), *with Kachalsky*, 701 F.3d at 100 (recognizing "that the need for self-defense may arise at any moment without prior warning," but affirming a requirement that a citizen "show[] that there is an objective threat to a person's safety – a 'special need for self-protection' – before granting a carry license" on the ground that "New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation"). (App. 41-42.) "'The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.'" *McDonald*, 130 S. Ct. at 3050 (plurality opinion) (quoting *Heller*, 554 U.S. at 634).

The court below, noting that "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," and assuming "that the Amendment must have ***some*** application in the very different context of the public possession of firearms," nonetheless deferred to the legislature's judgment that only law-abiding citizens who could prove that they had been threatened were entitled to "carry weapons in case of confrontation." *Kachalsky*, 701 F.3d at 88-89 & n.10, 93, 97-98. (App. 16, 24-25, 33.) The court of appeals reached this result by reading *Heller*, and the

Second Amendment, for the least that they could grammatically stand for. Furthermore, it stretched and reached for distinctions that in their insubstantiality reveal an animus against the very right at issue. For example, it treated as "a critical difference" the New York's statute's application "to carry[ing] handguns only ***in public***," while the District of Columbia's restriction struck down in *Heller* "applied ***in the home***." *Kachalsky*, 701 F.3d at 94. (App. 27.) The Second Circuit also cited this Court's inapposite case law respecting searches of the home and prosecution for possessing obscenity, and engaging in sexual conduct, within the home. *Id.* at 94. (App. 27-28.)

The Second Circuit's historical analysis was also discordant with that of *Heller*, *McDonald* and the Seventh Circuit in *Moore*, in relying on the fact that some 19th century courts upheld against constitutional challenge laws passed limiting the right to carry firearms concealed. However, the Second Circuit conceded that no court had addressed such a broad limitation as New York's, effectively prohibiting its citizenry from either open or concealed carry. *Id.* at 91, 94-96 ("[T]he cited sources do not directly address the specific question before us[.]"). (App. 20.) The Second Circuit appears to have concluded that, in the absence of a holding striking such a statute down, a State was therefore within its authority to limit Second Amendment rights in this unusual, bureaucratic way. Accordingly, the Second Circuit pronounced that "state regulation of the use of firearms in public was 'enshrined with[in] the scope' of the

Second Amendment when it was adopted," and proceeded to apply what it denominated "intermediate scrutiny." *Id.* at 96 (alteration in original) (quoting *Heller*, 554 U.S. at 634). (App. 26, 30-33.)

The Second Circuit then concluded that New York's decision "not to ban handgun possession, but to limit it to those individuals who have an actual reason . . . to carry the weapon," "rather than [a] merely speculative or specious . . . need for self-defense," "is substantially related to New York's interests in public safety and crime prevention," although plainly not "the least restrictive alternative." *Id.* at 98. (App. 36-37.) Even assuming that it could ever be constitutionally justified to advance a state interest solely by denying the vast majority of the citizenry the exercise of a constitutional right, the Second Circuit plainly did not apply heightened scrutiny as usually understood. *See Heller*, 554 U.S. at 628 n.27.

This is clear because while purporting to conduct "intermediate scrutiny," the Second Circuit neglected the necessary "fit analysis"; requiring no evidence from the State of New York that the regulation does not "'burden substantially more [protected activity] than is necessary to further the government's legitimate interests.'" *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). It also neglected the advancement requirement: "that the regulation will in fact alleviate [the recited harms] in a direct and material way." *Id.* at 664; *see Kachalsky*, 701 F.3d at 98 (refusing "to conduct a review bordering on strict scrutiny"). (App. 37.) Instead, it stated the issue as

merely "whether the proper cause requirement is substantially related to [public safety and crime prevention] interests," citing legislative reports that particular legislators believed that it was, the fact that a dwindling minority of States impose similar restrictions, and "studies and data [purportedly] demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky*, 701 F.3d at 97-99; *but see supra* Part II.B. (App. 33-38.)

Tellingly, the Second Circuit conceded that its approach was not consistent with the level of judicial protection for "any other enumerated right," *Kachalsky*, 701 F.3d at 100 (App. 41), a discriminatory approach this Court has rejected. *See McDonald*, 130 S. Ct. at 3044 (plurality opinion) (refusing to treat the "personal right to keep and bear arms for lawful purposes. . . . as a second-class right"). Instead of judicially protecting an enumerated right, the Court deferred to New York's preference for a policy over a right based on the state's claim "that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation." *Kachalsky*, 701 F.3d at 100. (App. 42.) In doing so, the Second Circuit employed a weighted interest-balancing test, deferring entirely to the judgment of the legislature that a core right can be broadly balanced against the State's ordinary

policy interests: "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments" regarding whether the right to bear arms should be limited to those who can show a "particularized interest in self defense." *Id.* at 99. (App. 38.) In this, the Second Circuit plainly treated the right to self-defense "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights' guarantees," something which it may not do. *McDonald*, 130 S. Ct. at 3044 (plurality opinion).

Everyone has, in the only relevant sense, a "particularized interest" in the exercise of their rights. First, this Court's case law, consistent with the Constitution's text, suggests no different level of constitutional protection for keeping handguns in the home than that accorded to bearing them without. Rather, it suggests the same standard should apply. *See Heller*, 554 U.S. at 592 (finding that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation" (emphasis added)); *id.* at 628 ("the inherent right of self-defense [is] central to the Second Amendment right."). While not purporting to provide an "exhaustive" list of "presumptively lawful regulatory measures," this Court in *Heller* did not include any restrictions on the general carrying of firearms by law-abiding, responsible citizens as one of the available "tools for combating [handgun violence]" or one of the lawful "measures regulating handguns." *See id.* at 626-27 & n.26, 636.

In sum, neither *Heller* nor *McDonald* contemplated governmental application of a proper cause to keep and bear arms standard to law-abiding citizens' exercise of self-defense rights. *Heller*, 554 U.S. at 635. Accordingly, New York's parsimonious approach to the right to bear arms should be found wanting. As the United States District Court for the District of Maryland, employing intermediate scrutiny to strike down Maryland's analogous restriction, so aptly put it, "[a] citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *appeal pending*, *Woollard v. Gallagher*, No. 12-1437 (4th Cir.).

Consequently, this Court should grant this petition both to make clear that the lower courts are not free "to repudiate the Court's historical analysis," *Moore*, 702 F.3d at 935, and to confirm the import of its citations in *Heller* to *Nunn* and *Andrews* that broad-brush restrictions on law-abiding citizens carrying handguns in public, whether open or concealed, premised on the view that the public is better off if citizens do not exercise their rights, run afoul of the "right of the people to . . . bear arms." *Heller*, 554 U.S. at 629; *see Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187 (1871). It should make plain that the Second Amendment took New York's "policy choice[] off the table." *Heller*, 554 U.S. at 636.

II. Because New York's Prohibition on Law-Abiding Citizens Carrying Handguns for Self-Defense Without First Demonstrating a Necessity Does Not Survive Any Level of Scrutiny More Demanding than the Rational Basis Test, This Case Presents an Excellent Vehicle to Make Clear that the Right to Bear Arms Merits Heightened Scrutiny and that the New York Law Fails.

No level of scrutiny that accords with American history and traditions or with this Court's individual rights jurisprudence could support the validity of New York's proper cause requirement. We note that this Court has rejected application of rational basis scrutiny to Second Amendment claims and has suggested that the presumption of constitutionality that figures so heavily in the Second Circuit's analysis in *Kachalsky*, 701 F.3d at 100 (App. 42), should not apply. *See Heller*, 554 U.S. at 629 n.27. In view of the experience of the States that respect their citizens' right to bear arms, and the social science literature, New York cannot demonstrate that its "proper cause" requirement is fitted to advancing the interests it asserts.

More than an Article V majority of the States, 41 at last count, *see* U.S. Const. art. V; John R. Lott, Jr., *What a Balancing Test Will Show For Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1207 (2012) (hereinafter Lott, *Right-to-Carry*), recognize their citizens' "natural right of defense 'of one's person,'" *Heller*, 554 U.S. at 585 (citation omitted), by requiring the issuance to

all law-abiding citizen applicants of a permit to carry a handgun in public. These "shall issue" permitting regimes generally require only that the applicant demonstrate the character of a law-abiding citizen reasonably proficient in the use of handguns. *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 690-91 (1995). Generally, to show that one is law-abiding, a criminal background check is performed to discover past criminal charges and convictions, including certain misdemeanors, protective orders, mental incompetency adjudications, and the like. *See, e.g.*, Fla. Stat. § 790.06(2)(a)-(g), (i)-(m), (3), (5)(a)-(e); N.M. Stat. Ann. § 29-19-4; Va. Code Ann. § 18.2-308(D) and (E)(1)-(20). Competency with a handgun may be demonstrated by showing record of completion of any number of designated training or safety courses. *See, e.g.*, Fla. Stat. § 790.06(2)(h)(1)-(7); Va. Code Ann. § 18.2-308(G)(1)-(9). It is estimated that nearly eight million Americans have been issued a permit to carry a handgun in public. *See* Lott, *Right-to-Carry*, *supra* at 1207.

Conversely, the State of New York requires a license to own or possess any handgun. *See* N.Y. Penal Law § 400.00(1). For those who meet the eligibility requirements to own a handgun and acquire a license to do so, they may carry a concealed firearm only upon a showing of proper cause. *Id.*, § 400.00(2)(f). And proper cause to carry a handgun for purposes of self-defense has been defined by the New York courts as requiring the applicant to

"'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession,'" which is not satisfied by the applicant's "living or being employed in a 'high crime area[].'" *Kachalsky*, 701 F.3d at 86-87. (App. 10.) In New York, a "'generalized desire to carry a concealed weapon to protect one's person and property does not constitute "proper cause,"'" as petitioners discovered when their applications were denied for "[f]ailure to show any facts demonstrating a need for self-protection distinguishable from that of the general public," *i.e.*, not reporting "'any type of threat to [their] own safety.'" *Id.* at 86, 88 (citation omitted). (App. 10, 13.) In short, the average, law-abiding New Yorker enjoys no legal right to bear a handgun in public for self-defense, but may engage in self-defense with a handgun only with the let and leave of local New York officials. *See* N.Y. Penal Law § 400.00(3)(a). Unsurprisingly, this regime has resulted in relatively few New Yorkers carrying. *Compare* N.Y. Div. of State Police, Firearms: Pistol Permit Bureau, http://troopers.ny.gov/Firearms/ (last visited Feb. 7, 2013), *with* U.S. Census Bureau, State & County Quick Facts: New York, http://quickfacts.census.gov/qfd/states/36000.html (last revised Jan. 10, 2013). This regime violates the plaintiffs' constitutional rights, for even average "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 630).

A. New York's Interest in Protecting the Public and Preventing Crime Does Not Justify Such a Broad Restriction.

Unquestionably, the "proper cause" requirement burdens "the core right identified in *Heller* – the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (emphases omitted) (suggesting that any abridgement of the "core right" would be subject to strict scrutiny). Although strict scrutiny should be adopted in this scenario – a crude rationing regime of the right to bear arms outside the home for law-abiding citizens who are competent to carry – this restriction is subject, at the very least, to the burden of satisfying intermediate scrutiny. Intermediate scrutiny can be met only by "demonstrating (1) that [a State] has an important governmental 'end' or 'interest' and (2) that the end or interest is substantially served by enforcement of the regulation." *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000)). Furthermore, the State may not "rely upon mere 'anecdote and supposition'" in attempting to meet its burden to show that the claimed ends are substantially served by the "proper cause" requirement. *Id.* at 418. And while the requirement, under an intermediate standard, need not be the "least restrictive means" to pass muster, it may not "substantially burden more" of the exercise of Second Amendment rights "than is necessary to further the government's legitimate interests" or "regulate . . . in such a manner that a substantial

portion of the burden on [constitutional rights] does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

New York claimed below that its requirement advances its interests in "public safety and crime prevention." *Kachalsky*, 701 F.3d at 97, 98. But the State cannot simply prohibit handguns, "the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Furthermore, the exercise of the right itself cannot be the evil to be remedied. That is, New York can claim no legitimate interest in preventing law-abiding citizens from using "handguns for the core lawful purpose of self-defense," nor may it so circumscribe that right to eliminate it for the ordinary citizen. *See id.* at 630. New York's statute is thus premised on a belief that runs contrary to our system of ordered liberty: that law-abiding citizens may not be trusted to bear arms in defense of themselves and that there is a presumption against their doing so.

The "proper cause" requirement obviously is not a proper fit for the claimed interest in reducing "widespread access to handguns in public" so as to decrease "the likelihood that felonies will result in death." *Kachalsky*, 701 F.3d at 99. Moreover, it necessarily overburdens the core right.

Other proponents of such restrictions have claimed that such requirements limit the availability of handguns to criminals. The reasoning proceeds that by prohibiting law-abiding citizens from carrying handguns in public, there will be fewer persons who

criminals can steal them from. But this rationale proves too much as it offers no justification for distinguishing between persons with proper cause and those without, or distinguishing between carriage outside the home or possession within it, and thus would justify prohibiting all persons from carrying or owning handguns, for anyone could be robbed of them. And the risk is implausible on its face, as unlike police officers who are known to keep guns, criminals are unlikely to know which law-abiding citizens do, making them difficult to target. This concern is made all the more implausible by New York's permitting only concealed rather than open carry. *See Kachalsky*, 701 F.3d at 86.

Other proponents assert that allowing persons to carry handguns outside the home does not further the self-defense interests of citizens because they might be caught off-guard and, lacking adequate training, have the gun turned upon them by an assailant. It has also been suggested that the incidence of accidents is increased by allowing more persons to carry. Such a practical elimination of the right of self-defense for most citizens because of a claimed fear that the right might be less effective than in the home is to cry crocodile tears. Moreover, requiring sufficient training, as New York does for residents of the County of Westchester only, N.Y. Penal Law § 400.00(1)(f), and as many other States do, would adequately mitigate these concerns without the wholesale abridgement of the rights of citizens. *See, e.g.*, N.C. Gen. Stat. § 14-415.12(a)(4); S.C. Code Ann.

§ 23-31-210(5); Va. Code Ann. § 18.2-308(G); W. Va. Code § 61-7-4(d).

Another argument that might be raised in the proper cause requirement's defense is that the restriction results in not authorizing carriage by citizens who subsequently use the lawful firearm unlawfully. As a matter of statistical probabilities, some portion of the persons who later commit felonies with firearms will not have previously committed a felony, and thus may be qualified at some point in their lives as law-abiding, and thus may be issued a New York carry permit but-for the proper cause requirement. Of course, a future felon could still be issued one; they are simply less likely to be, just like everyone else, because so few are issued. And plainly there is no fit at all between the proper cause requirement and the claimed concern because requiring one to receive a threat before being permitted to carry does not tend to filter out future felons (in fact, it could filter them in). And, if it chose, New York could, as other states have done, impose additional restrictions to those it already imposes that are predictive of future criminality, *see* N.Y. Penal Law § 400.00(1)(a)-(f), such as a history of involvement in a criminal gang or drug abuse. *See, e.g.*, Minn. Stat. § 624.714, subd. 2(b); N.M. Stat. Ann. § 29-19-4(A) and (B); N.C. Gen. Stat. § 14-415.12(a)(3), (b)(1)-(11); Va. Code Ann. § 18.2-308(G)(1)-(20); W. Va. Code § 61-7-4(a)(4), (5), (6), (7), and (8). There is, in any event, no evidence that New York's other restrictions do not

adequately prune from the applicant field future bad apples.

Proponents of such laws have contended that such requirements reduce the likelihood that disputes will result in the use of deadly force. It might more logically be supposed that depriving most citizens of the right of self-defense will make it more likely that confrontations with the non-law abiding will turn deadly for the law abiding. Moreover, by ensuring that persons who are subject to individualized threats have handguns, New York is already intentionally increasing the likelihood that deadly force will be employed in a confrontation. Furthermore, the policy choice to abridge the right of self-defense for most citizens in most circumstances is foreclosed by the Second Amendment itself.

Lastly, some proponents have suggested that having fewer law-abiding citizens carrying handguns in public – the natural and intended effect of the proper cause requirement – reduces interference with the ability of law enforcement to protect public safety by reducing the number of persons who police observe carrying a handgun, thus supposedly presenting fewer persons for the police to stop and speak with on suspicion of criminal activity. Again, cause requirement proponents are grasping at straws, for New Yorkers that are licensed to carry are required to do so concealed. In any case, it is a matter of some dispute in the lower courts whether suspicion that an individual is carrying a handgun, without more, justifies an investigatory stop. *See* (Pet. 16-17.)

The effect of requiring a proper fit between the dangers arising from the exercise of a right and a State's response to that danger is to ensure that the right is being appropriately valued and protected by the State. However, in the guise of protecting the public, a State may not simply eliminate that right for most people in most circumstances on the ground that it is the right itself that is the problem. *See Woollard*, 863 F. Supp. 2d at 475 ("States may not, however, seek to reduce the danger by means of widespread curtailment of the right itself.").

B. New York Cannot Show that its Restriction is a Proper One Because the Experiences of a Large Number of the States and Empirical Evidence Demonstrate that Right-to-Carry Laws Do Not Increase Criminal Violence and that Carry Restrictions on Law-Abiding Citizens Do Not Reduce Crime.

As noted previously, New York is one of merely a handful of States which require its law-abiding citizens to satisfy a State official that a handgun is needed to defend themselves in public. Instead of placing this life and death decision in the hands of an unaccountable agency, forty-one other States leave to citizens who have been determined to be law-abiding and to possess the requisite proficiency with a handgun, the decision whether they will protect themselves. With these rules having been in place for decades in some States, and their effects having been

studied since their inception, the social science research demonstrates that public carry of handguns by law-abiding citizens does not increase criminal violence or threaten public safety, but prevents crime and protects the public.

In 1987, the State of Florida adopted what has become the model for handgun carry permit laws: non-discretionary issuance of permits to carry handguns concealed in public upon a showing that the applicant was a law-abiding citizen who possessed the requisite proficiency in the handling of a handgun. *See* Fla. Stat. § 790.06; Cramer & Kopel, *The New Wave*, *supra* at 690-91. Since then, dozens of states have followed suit, licensing millions of law-abiding citizens to carry handguns in public for self-defense on their own initiative. *See* Lott, *Right-to-Carry*, *supra* at 1207. Public support for repealing these laws or imposing tighter restrictions, despite recent acts of mass violence involving the use of guns, and a sustained legislative push, remains weak. *See generally* Rasmussen Reports, *Gun Control*, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control (last visited Feb. 7, 2013).

This broad political consensus against sweeping gun control and in favor of self-defense rights is premised upon a view of criminal behavior that enjoys both empirical support and differs fundamentally from the assumptions underlying the New York proper cause requirement. The political consensus in the States may be summarized as follows: law-abiding citizens, those whose past actions do not

suggest future criminality, are not likely to be perpetrators, but victims, of crime. When laws are in place that forbid the keeping and bearing of arms, whether in the home or outside of it, or only in certain places, those citizens will abide by them. However, those who commit acts of violence, whether assault, robbery, burglary, rape, or murder, are unlikely to be deterred from those crimes by an additional law forbidding possessing or carrying their desired weapon or by the knowledge that the police may apprehend them in the attempt or after the fact. In such cases, the only protection for the citizen is the would-be criminal's knowledge that their would-be victim could be armed and the ability of that citizen to act effectively in self-defense. *See* Cramer & Kopel, *The New Wave*, *supra* at 686.

This view of criminal behavior is confirmed by scholarly conclusions that a jurisdiction's adoption of right-to-carry laws results in the reduction of violent crime rates. *See* Lott, *Right-to-Carry*, *supra* at 1212-16. In a seminal study of the effects of right-to-carry laws, which were then in place in only eighteen states, it was found that following adoption, "murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent." John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 23 (1997). Further studies following the effects of these laws over time indicate that rates of violent crime experience greater "drops the longer the right-to-carry laws are in effect" and "[t]he greater the percentage of

the population with permits." *See* Lott, *Right-to-Carry*, *supra* at 1212.

Sadly, the political and scholarly consensus is also confirmed by the high incidence of violence in jurisdictions that continue to impose onerous restrictions on law-abiding citizens owning or carrying firearms. Take Chicago for example, which both prohibits the possession of firearms anywhere without a permit, *see Gowder v. City of Chicago*, No. 11-C-1304, 2012 U.S. Dist. LEXIS 84359, at *3; 2012 WL 2325826, at *1 (N.D. Ill. June 19, 2012), and is located within the only State that completely bans citizens from carrying or possessing weapons almost anywhere outside their home. *See* 720 Ill. Comp. Stat. 5/24-1(4); *but see Moore*, 702 F.3d at 942. Despite all this regulation, the rate of violent crimes has been tragically high for decades and remains so. *See* Mark Konkol & Frank Main, *Chicago under fire: Murders rising despite decline in overall crime*, Chicago Sun-Times, July 7, 2012, *available at* http://www.suntimes.com/news/violence/13574486-505/chicago-under-fire-murders-rising-despite-decline-in-overall-crime.html. The suggestion that permit holders will suddenly turn to a life of wanton violence is not borne out by the data either, as demonstrated by the experience of Florida, which issued over 2 million permits from October 1, 1987 to July 31, 2011 and revoked "[o]nly 168 . . . for any type of fire-arms related violation," less than 1 percent, and those violations were mostly for "accidentally carrying concealed handguns into restricted areas." Lott, *Right-to-Carry*, *supra* at 1211.

Nor is there any academic support for the argument that permitting law-abiding citizens to carry handguns in public increases the incidence of "accidental gun deaths or suicides." Lott, *Right-to-Carry*, *supra* at 1206. In sum, New York is left with only "anecdote and supposition" to justify its substantial impairment of fundamental rights. *Playboy Entertainment*, 529 U.S. at 822. That should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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State Attorneys General

A Communication from the Chief Legal Officers of the Following States:

Alabama * Colorado * Florida * Georgia * Idaho * Kansas * Montana Nebraska * Ohio * Oklahoma * South Carolina * Texas * West Virginia

March 26, 2013

BY ELECTRONIC DELIVERY AND FEDERAL EXPRESS

Secretary Kathleen Sebelius
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9968-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Dear Secretary Sebelius:

Thank you for the opportunity to comment on your proposed amendments to RIN 0938-AR42, Coverage of Certain Preventive Services under the Affordable Care Act.

The proposed regulations selectively address faith and conscience-based objections to a government mandate that requires businesses and nonprofits to pay for insurance coverage for contraception and other reproductive services. They allow a limited few religious nonprofits, such as houses of worship, to avoid the "HHS mandate" altogether. The proposed regulations purport to allow a few other religious-affiliated nonprofits, such as Catholic Charities, to avoid paying directly for these reproductive services by requiring the insurance companies that cover the organizations' employees to provide "free" coverage. The proposed regulations provide no exception to the HHS mandate for for-profit business owners who object on conscience grounds.

We believe the proposed regulations do not remedy the legal infirmities in the original HHS mandate. As you know, the Religious Freedom Restoration Act or "RFRA," 42 U.S.C. § 2000bb, requires the federal government to use the least restrictive means to accomplish a compelling governmental interest. RFRA cuts across all federal regulations and requires "strict scrutiny" of all actions of the federal government that burden the exercise of religion. We see three problems with the proposed regulations under RFRA.

First, there is no compelling reason to refuse to extend to all religious-affiliated nonprofits the exception that is available to houses of worship. RFRA requires the federal government to demonstrate that the compelling-interest test is satisfied through application of the challenged law "'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

U.S. 418, 430-31 (2006). The government must show with particularity how its interest "would be adversely affected by granting an exemption." *Id.* at 431 (internal quotations omitted). The Supreme Court has held that this test is very difficult to meet when the government allows an exception to one group or person but not to others. *Id.* This is so because allowing an exception for one group "fatally undermines" the argument that the government has a compelling interest in denying others the same or similar exception. *Id.* at 434. The proposed regulations allow an absolute exception for some religious nonprofits and deny that exception to other groups without any compelling reason for distinguishing between the two groups.

Second, the purported accommodation to allow certain nonprofits to shift costs onto insurance companies appears to be a shell game that does not alleviate the burden on the exercise of religion. We all know that insurance companies do not provide anything for free; the employers are still going to be paying for these services through increased premiums or otherwise even if the insurance company technically covers those products through a separate "free" policy. You have argued that insurers will gladly provide this coverage for free because overall health costs are purportedly reduced when an insured has access to free reproductive services. This proposition strikes us as highly unlikely. If insurers could reduce their costs by providing these services for free, then insurance companies would already be providing them for free; the entire regulation at issue would be unnecessary. The truth of the matter is that these services, like everything else, costs money. Just as they do now, insurance companies will recoup their increased costs by shifting the costs back to employers. The purported accommodation amounts to little more than an accounting gimmick.

Third, the government must provide a meaningful exception to the HHS mandate for for-profit business owners who object on conscience grounds, but the proposed regulations fail to address for-profit organizations at all. That failure is a particular problem under RFRA if one assumes that you are correct that your proposed "accommodation" for nonprofits would be costless. If you are correct that insurance companies will actually *benefit* by providing insurance coverage for free (which seems highly doubtful as explained above), then there is no compelling reason for you to limit this purported accommodation to nonprofits. Under your logic, insurers would benefit *even more* if insurance companies were required to provide insurance coverage for these services for free to the employees of all businesses, including the employees of for-profit businesses whose owners object to the HHS mandate. To be clear, we believe that the proposed cost-shifting "accommodation" does not satisfy RFRA and that appropriate religious exemptions must be provided for nonprofits and for-profits. But, even under your own logic, the proposed regulations would not be the least restrictive means of providing coverage for these services to the employees of for-profit businesses.

We fear that the HHS mandate is the first of many regulations under the Affordable Care Act that will conflict with legal protections for religious liberty and the right of conscience. We respectfully submit that RFRA requires you to adopt the broadest possible religious exceptions to the HHS mandate.

Respectfully submitted,

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Mike DeWine
Ohio Attorney General

Scott Pruitt
Oklahoma Attorney General

Alan Wilson
South Carolina Attorney General

Greg Abbott
Texas Attorney General

Patrick Morrisey
West Virginia Attorney General

Promise 9 - Hold a "Jobs Summit"

Hold a "Jobs Summit" to identify any and all overreaching regulations that may impair business growth in the State of West Virginia. Since the Office of Attorney General possesses the legal power to play a significant role in the regulatory process, we should identify the regulations that are having the most negative impact on economic growth.

Actions Taken:

- ✓ On April 17, 2013, Attorney General Morrisey held his Jobs Summit kickoff event in the Lower Rotunda of the State Capitol.
- ✓ More than fifty people attended the Jobs Summit kickoff event, including elected officials, job providers, business organizations and members of the public at large.
- ✓ As part of the kickoff event, Attorney General Morrisey engaged in a question & answer session on a variety of issues related to the Jobs Summit & Listening Tour, and also discussed the Office of the Attorney General's plans for the concluding Jobs Summit Finale to take place later in the year.
- ✓ Attorney General Morrisey laid out the goals of the Jobs Summit & Listening Tour, which include:
    - ✓ Identify and take steps to remove regulatory barriers that impeded job growth in the state.
    - ✓ Increase private sector employment in the state.
    - ✓ Attract new capital and investments to the state in order to foster vibrant manufacturing, service and construction sectors, to name just a few.
    - ✓ Enhancing West Virginia's competitiveness when compared to surrounding states.
    - ✓ Improve West Virginia's image to people and businesses located outside the state.
- ✓ Participants at the kickoff event included the West Virginia Chamber of Commerce, Associated Builders & Contractors - WV Chapter, West Virginia Coal Association, and many others, who expressed their support of the goals of the Attorney General's Jobs Summit & Listening Tour.
- ✓ As part of the ongoing Jobs Summit & Listening Tour, Attorney General Morrisey will be traveling across the state to meet with stakeholders to discuss ways in which the Office of the Attorney General can help improve the state's business climate.

Jobs Summit & Listening Tour

W. Va. Jobs Summit & Listening Tour Goals

1) Identify and take steps to remove regulatory barriers that impede job growth in the state.

2) Increase private sector employment in the state.

3) Attract new capital and investments to the state in order to foster vibrant manufacturing, service and construction sectors, to name just a few.

4) Enhance West Virginia's competitiveness when compared to surrounding states.

5) Improve West Virginia's image to people and businesses located outside the state.

the Charleston Gazette
THE STATE NEWSPAPER

April 17, 2013

Morrisey wants to remove barriers that impede job growth

By Megan Workman

CHARLESTON, W.Va. -- Anyone in West Virginia would agree that it's important to take steps to remove barriers that impede private-sector job growth, said Bob Welty, Fifth Third Bank's state president in West Virginia.

Welty attended Wednesday's kickoff event at the state Capitol for Attorney General Patrick Morrisey's "Jobs Summit & Listening Tour."

The jobs summit is part of Morrisey's 17-point plan for his first 100 days in office to meet with business leaders, consumer advocates and interested public citizens, the attorney general said.

Morrisey presented five goals of the "Jobs Summit & Listening Tour" to nearly 50 people Wednesday afternoon.

They are:

· To identify and take steps to remove regulatory barriers that impede job growth in the state.
· Increase private-sector employment in West Virginia.
· Attract new capital and investments to the state in order to "foster vibrant manufacturing, service and construction sectors."
· Enhance West Virginia's competitiveness when compared to surrounding states.
· Improve the state's image to people and businesses located outside the state.

"If you look at his five points, Fifth Third has a strong commitment to West Virginia and his goals," Welty said. "We're interested in ideas anyone has in spurring economic growth in West Virginia. ... These are people looking for fresh ideas."

The Mountain State has many different types of economies and regions with diverse ideas, Morrisey said. He wants to ensure "no part of the state is left behind."

Morrisey will travel across West Virginia over the next six months to hear residents' thoughts about what can be done to improve the state's business climate.

He will visit the Eastern Panhandle later this month, he said.

"The jobs summit cannot succeed without public input," Morrisey said. "There's a perception problem out there. Let's figure out what we can do to change these perceptions ... so we can let people across the nation know how vibrant we are."

Forbes ranked West Virginia 45th in the nation for "best states for business" last year. Another study put the state at 44th in the U.S. for business friendliness, Morrisey said.

Being ranked at the bottom isn't acceptable, he said.

"For years, the business climate has compared poorly to other states," he said. "Starting a business in West Virginia can be very daunting. We must kick-start job development."

The state must clean its workforce of a perpetual prescription-drug problem, Morrisey said.

Wendy E. McCuskey, president of the Associated Builders & Contractors West Virginia Chapter, said the construction sector has "a huge drug problem with our workers.

"When we host a job fair, about 10 to 15 people out of 150 pass a drug test at job fairs," McCuskey said after the jobs summit. "We're excited to have a partner as an advocate for business owners."

The state lost 100 construction jobs last month.

McCuskey said business owners with the Associated Builders & Contractors get "bogged down" with regulations, which makes their job that much harder.

Morrisey said he plans to take each opinion presented during the "Jobs Summit & Listening Tour" and consider whether his office can do something about it.

He also anticipates reaching out to affected state clients and giving them an opportunity to react to West Virginians' ideas.

Finally, he may modify a package of ideas that he would present to the Legislature, he said.

"We're going to go around the state, ask questions and listen. We're going to benefit by getting your feedback," Morrisey said. "The attorney general's office will take all necessary steps to help move our economy forward."

Morrisey asks West Virginians who do want to submit an opinion about how the attorney general's office can help attract jobs to the state to email communications@wvago.gov and include in the subject line "Job Summit & Listening Tour."

Promise 10 - Address Medicaid in a Meaningful Way

Work with the Governor and the Legislature to help address the budget shortfall facing the State's Medicaid Program. Through legal counseling, we will make recommendations about how the State can meet its financial challenges, while advancing new strategies to improve health care outcomes and lower health care costs for our State.

Actions Taken:

- ✓ Attorney General Patrick Morrisey has initiated substantive discussions with a number of senior state officials and members of the Legislature about how to improve the state's Medicaid Program.
- ✓ In these discussions, Attorney General Morrisey has outlined specific ideas about the legal mechanisms available to West Virginia to test innovative models to reduce Medicaid costs and enhance the quality of health care received by Medicaid beneficiaries.
- ✓ The Attorney General's Office has offered to help the West Virginia Department of Health & Human Resources (DHHR) submit several proposals to the Center for Medicare and Medicaid Innovation (CMMI) to test creative ways of improving West Virginia's Medicaid Program.
- ✓ Based upon his discussions with DHHR, Attorney General Morrisey will seek to establish a new memorandum of understanding with DHHR and its Inspector General to allow the Attorney General to pursue Medicaid fraud and abuse cases against small and medium-sized companies. The Attorney General's Office seeks to work collaboratively with the Inspector General's office to help eliminate fraud, waste and abuse wherever it exists.

Illustrative Areas of Focus to Improve Health Care Outcomes and Reduce Medicaid Expenditures in a Meaningful Way

During his first 100 days, Attorney General Patrick Morrisey has initiated preliminary discussions with the Governor, senior state officials, and members of the State Legislature about how to reform health care in West Virginia, improve outcomes, increase access to insurance coverage, and reduce health care costs. Most importantly, Attorney General Patrick Morrisey has emphasized that he seeks to build consensus across the political spectrum on ways to help address West Virginia's health care problems.

In light of the concerns set forth below and the failure of the Affordable Care Act (ACA) to meaningfully bend the health care cost curve, West Virginia must step up efforts to reform its health care system and keep its fiscal house in order. Fortunately, the West Virginia Attorney General's office can play a very important and positive role in achieving these objectives.

West Virginia health care trend lines are not promising. Medicaid costs alone represent approximately twenty percent of the entire state budget and are expected to grow dramatically. With respect to most key health care measures, West Virginia consistently ranks near the bottom of many national rankings. For example, according to United Health Foundation, West Virginia ranked 47th on its list of "healthiest states," a system that judges the health care status in a state by measuring, among other items, health care outcomes, diabetes, smoking, and obesity.

Our state stands in the cross-roads regarding how it plans to reform its health care delivery system. The state must, simultaneously and dramatically, improve wellness while reducing outlays. Accomplishing such a task is ordinarily difficult enough, but the state's efforts are further exacerbated because West Virginia is an aging state and operating under an extremely tight budgetary environment. Significantly, the U.S. Census indicates that 16 percent of West Virginians are aged 65 or older; economists expect that percentage to climb to 19 percent by 2017. With a rapidly aging population and an increase in the number of individuals dually-eligible for Medicare and Medicaid, the state's average per-capita costs for health care shows no signs of declining. Meanwhile, according to some observers, the state budget may face a massive fiscal shortfall it will need to address in Fiscal Year 2014.

With the federal government facing daunting budget problems of its own, our state's share of federal Medicaid dollars will most likely dissipate in the next few years, potentially adding several hundred million dollars in new, ongoing structural deficits to our state budget. How West Virginia responds to these challenges may very well determine the state's economic fate for the rest of the 21st Century.

Reforming health care should not be a Republican or Democratic initiative; it should be non-partisan and put the people of West Virginia first. To that end, Attorney General Patrick Morrisey already has shared several ways the state may begin saving monies immediately and take advantage of federal waiver programs that allow West Virginia to test pilot projects that seek

to improve the quality of health care delivered to Medicaid patients and those who are dually-eligible for Medicare and Medicaid, and to reduce health care spending.

A brief summary of some of the topics covered during these preliminary discussions are included below:

1. Submit demonstration programs to the Centers for Medicare and Medicaid Services (CMS) to test innovative models that significantly modify the State's Medicaid Program.

   Under section 3021 of the ACA, many entities, including states, are provided new opportunities to submit demonstration projects to the Center for Medicare and Medicaid Innovation (CMMI) to test ways to improve quality and reduce health care costs. If a model tested ultimately demonstrates that it maintains quality and reduces costs, it may be made permanent, without an additional act of Congress. Unlike other Section 1115 waivers, the Agency possesses far greater flexibility to administer budget-neutrality rules in a CMMI process.

   The scope of CMS' power under CMMI is vast. Under the provision, CMS may waive any section of the Social Security Act under Title XVIII (Medicare), Title XI (wide variety of federal program requirements, administrative simplification, and fraud and abuse) and several sections of Medicaid law. Significantly, for West Virginia, this means CMS may waive "statewideness" requirements (allowing West Virginia to test the feasibility of rolling out varying types of projects in different regions of the state), modify the process for determining provider payment rates, and grant West Virginia additional flexibility in terms of how private plans are reimbursed. The breadth of authority under CMMI also allows the state to serve dual-eligible populations in an innovative manner.

   As many health care analysts know, dual-eligible enrollees traditionally face serious coordination of care problems and represent major cost challenges for state and federal governments alike. New models may be developed under CMMI to allow West Virginia to identify the best ways to incentivize plans to manage the health care costs of certain high-risk dual-eligible beneficiaries with unique needs, enhance health care outcomes, mitigate cost-sharing tussles that typically occur between states and the federal government, and improve the quality of beneficiaries' experience with health care coverage in our state. If structured correctly, Medicaid may save monies while improving the quality of care received by beneficiaries.

   In the Attorney General's office, we appreciate the primary role of the Department of Health and Human Resources (DHHR) in managing day-to-day Medicaid matters, which is why we seek to develop any innovative initiatives with that office in a collaborative manner that leverages their substantive expertise of the state's Medicaid Program. As lawyers and counselors to the Medicaid Program, we simply want to help the state make informed choices so that it targets resources to those who need it most. Over the past 100

days, we have held a number of meetings with key state officials to begin a dialogue about the growing health care problems in West Virginia that need immediate attention. Reducing Medicaid expenditures and improving the quality of care for beneficiaries in this Program are near the top of that list.

In order to achieve consensus, we seek to continue working with DHHR and a number of state officials to develop several major initiatives that may be submitted to CMS under the CMMI authority. Such initiatives will require assistance from both state and federal representatives and a willingness to put West Virginia's long-term interests first. Over the next year, the Attorney General's office will be developing "thought papers" to further advance the health care reform debate in the state.

2. Reduce Fraud and Abuse in the West Virginia Medicaid Program.

Based upon preliminary discussions with DHHR and the DHHR Inspector General, the Attorney General's office believes it may be able to establish a new working relationship that can substantially reduce fraud and abuse and enhance Medicaid program integrity.

Medicaid fraud and abuse costs the state tens of millions of dollars a year annually. We believe that significant financial benefits may be realized for the state if our office begins focusing additional attention on certain types of small and medium-sized civil health care fraud and abuse cases that previously were not pursued by the Attorney General's office. In the past, attention was focused almost exclusively on obtaining large civil settlements. While our office will continue to maintain vigorous prosecution of large companies who violate West Virginia laws, we should also send a message to small and mid-sized actors that theft of Medicaid dollars will not be tolerated. The Attorney General's office must help eliminate fraud, waste, and abuse wherever it exists.

Promise 11 - Crack Down on Medicaid Fraud

Crack down on Medicaid fraud by initiating a close review of Medicaid eligibility to ensure that precious government resources are being targeted to those who need it the most.

Actions Taken:

✓ Attorney General Morrisey held several meetings with the West Virginia Department of Health & Human Resources (DHHR) to discuss ways in which the Office of the Attorney General can work with WV DHHR and the Inspector General to ensure that Medicaid funding is spent appropriately.
✓ The Attorney General and staff have started working with members of WV DHHR on possible program integrity issues that would improve Medicaid fraud detection and prevention, including, but not limited to, benefit enrollment and eligibility issues.
✓ The Office of the Attorney General and WV DHHR also are looking at ways to collaborate on Medicaid fraud and control issues from a civil perspective, so that WV DHHR can better pursue low-dollar cases in state court.
✓ The Attorney General's Office will continue to work closely with WV DHHR on Medicaid fraud prevention issues that will hopefully save the state tens of millions of dollars in waste and abuse.

Promise 12 - Fight Prescription Drug Abuse

Request new prosecutorial authority from the Legislature to help pursue criminals who facilitate our prescription drug abuse problems in West Virginia. Prescription drug abuse cuts across county lines. As such, the Attorney General should play a far more proactive role coordinating prosecutions across the 55 counties.

Actions Taken:

✓ Attorney General Morrisey has initiated a dialogue with state lawmakers to discuss how additional prosecutorial powers would help the Office of the Attorney General tackle prescription drug abuse in West Virginia. The Attorney General has set forth several compelling reasons for such prosecutorial powers, which include the ability to coordinate the state's prosecutorial efforts related to prescription drugs.
✓ On March 11, 2013, Attorney General Morrisey joined with forty-seven other attorneys general in a letter encouraging the U.S. Food and Drug Administration to make generic pain pills harder to abuse. The letter highlighted the significant dangers of prescription drug abuse, and asked the U.S. Food and Drug Administration to take steps to ensure that generic drugs are designed with tamper-resistant features.
✓ The Office of the Attorney General is partnering with the Division of Protective Services to participate in the sixth National Prescription Drug Take-Back Day on April 27th at the State Capitol. The event, which is spearheaded by the federal Drug Enforcement Administration, allows for the safe collection and disposal of unused medication in an effort to prevent potential drug abuse.
✓ The Office of the Attorney General is currently investigating the role that various entities play in the prescription drug abuse epidemic and how West Virginia can better control the supply and demand side of this terrible problem.

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
ATTORNEY GENERAL

(304) 558-2021
FAX (304) 558-0140

April 4, 2013

The Honorable Nancy Peoples Guthrie
Room 206E, Building 1
1900 Kanawha Boulevard, E.
Charleston, WV 25305

Dear Delegate Guthrie:

I wanted to reach out to you regarding legislation that you co-sponsored during last year's legislative session. You joined with Delegate Virginia Mahan on H.B. 4325 -- which would have granted prosecutorial powers to the Attorney General. I write to you to gauge your interest in supporting similar legislation again in the future.

While there are many reasons why such authority would benefit the citizens of West Virginia, one is particularly compelling. As a state, I believe we must become far more aggressive in taking on the prescription drug abuse epidemic. By providing the Attorney General's Office with explicit prosecutorial and coordinating authority in this area, we would be able to better coordinate the State's efforts to pursue lawbreakers across county lines. I think that you and I could both agree that a solution to the prescription drug abuse problem cannot be achieved through a piecemeal, county-by-county strategy.

Fighting prescription drug abuse will be one of my top priorities as Attorney General. Given your past support of providing broad prosecutorial authority to the Attorney General's Office, would you be interested in publicly endorsing a legislative change that allows our office to help tackle the state's prescription drug abuse problem with greater legal tools?

If you would be interested in discussing this matter further, please let me know if there is a time convenient for you to meet in the next few weeks. I would greatly appreciate working with you on this important topic. Thank you for considering this request.

Sincerely,

Patrick Morrisey

Patrick Morrisey
Attorney General

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
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(304) 558-2021
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April 11, 2013

The Honorable Rick Thompson
Speaker of the House
Room 228M, Building 1
1900 Kanawha Boulevard, E.
Charleston, WV 25305

The Honorable Tim Armstead
Minority Leader
Room 264M, Building 1
1900 Kanawha Boulevard, E.
Charleston, WV 25305

Dear Speaker Thompson and Minority Leader Armstead:

RE: Legislative Requests Relating to the Office of the Attorney General

I am writing to follow up on several topics that we have discussed during this legislative session.

As you know, last year, legislation was introduced in the House of Delegates (H.B. 4325) to grant prosecutorial powers to the Attorney General. While the House Government Organization Committee recommended passage of this legislation, it ultimately died in the House Judiciary Committee. In the upcoming months, I would like to work with both of you as well as members of the House of Delegates and the Senate to reach an agreement on how we may be able to advance similar legislation. I believe such legislation would facilitate my office's ability to help address West Virginia's prescription drug abuse epidemic and enhance election law interpretation and enforcement in our state.

Clearly, we can all agree that tackling prescription drug abuse should be one of our state's top priorities. Based upon the most recently available information from the Centers for Disease Control, the Mountain State has one of the highest rates of drug overdose deaths in the nation, a sad and scary statistic that I am committed to change. Indeed, I have made fighting prescription drug abuse a top priority of my administration. As part of that effort, I recently joined with 47 other Attorneys General in a letter encouraging the U.S Food & Drug Administration (FDA) to require the use of tamper-resistant and abuse-resistant formulations for generic drugs.

Unfortunately, even if the FDA agrees with our recent letter, it will only serve as one incremental step in West Virginia's efforts to address the prescription drug abuse epidemic. We currently are analyzing a number of different ideas to address the supply and demand sides of the problem, as well as potential investigations that, when implemented, should make additional progress.

While we continue to develop our overall strategy on prescription drug abuse, we have already reached one conclusion: Additional investigative and prosecutorial attention is sorely needed. County prosecutors and law enforcement are doing everything they can to combat prescription drug abuse, but an unfortunate reality is that many counties lack sufficient resources to focus adequate attention on the issue. Further, because prescription drug abuse cuts across county lines, the coordination and prosecution of this problem across the fifty-five counties under the current enforcement regime is very challenging.

I believe that the Attorney General's Office could play a far more proactive and helpful role in combatting prescription drug abuse if we obtained explicit prosecutorial authority. We already possess civil investigative authority in this area and plan to rely upon consumer protection investigators to detect abusive prescription drug abuse patterns. Obtaining prosecutorial authority represents a logical next step for this office and would allow West Virginia law enforcement to more effectively pursue some of the criminals who currently are falling through the cracks of our state's enforcement regime.

In the area of election law enforcement, I believe expanded authority is also warranted and would complement our office's investigative capacity and knowledge of election laws. As you know, the Attorney General's office currently assists the Secretary of State when it comes to the interpretation of state election laws. For instance, our office provides legal opinions on any questions and representation to the Secretary of State's Office when state election laws are challenged in court. I am interested in exploring ways to further cement the natural working relationship between the Offices of the Secretary of State and the Attorney General by clarifying the role that the Attorney General can play in helping the Secretary of State enforce state election law.

Thank you for your consideration of the issues raised in this letter. As always, I appreciate our working relationship and look forward to any feedback you may have on these or other important topics.

Sincerely,

Patrick Morrisey
Attorney General

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
ATTORNEYGENERAL

(304) 558-2021
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April 11, 2013

The Honorable Jeffrey Kessler
President of the Senate
Building 1, Room 227M
1900 Kanawha Boulevard, East
Charleston, WV 25305

The Honorable Mike Hall
Senate Minority Leader
Building 1, Room 245M
1900 Kanawha Boulevard, East
Charleston, WV 25305

RE: Legislative Requests Relating to the Office of the Attorney General

Dear President Kessler and Minority Leader Hall:

I am writing to follow up on several topics that we have discussed during this legislative session.

Last year, legislation was introduced in the House of Delegates (H.B. 4325) to grant prosecutorial powers to the Attorney General. While the House Government Organization Committee recommended passage of this legislation, it ultimately died in the House Judiciary Committee. In the upcoming months, I would like to work with both of you as well as members of the Senate and House of Delegates to reach an agreement on how we may be able to advance similar legislation. I believe such legislation would facilitate my office's ability to help address West Virginia's prescription drug abuse epidemic and enhance election law interpretation and enforcement in our state.

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Thank you for your consideration of the issues raised in this letter. As always, I appreciate our working relationship and look forward to any feedback you may have on these or other important topics.

Sincerely,

Patrick Morrisey
Attorney General

National Association
of Attorneys General

PRESIDENT
Douglas F. Gansler
Maryland Attorney General

PRESIDENT-ELECT
J.B. Van Hollen
Wisconsin Attorney General

VICE PRESIDENT
Jim Hood
Mississippi Attorney General

PAST PRESIDENT
Roy Cooper
North Carolina Attorney General

EXECUTIVE DIRECTOR
James McPherson

March 11, 2013

Margaret A. Hamburg, M.D.
Commissioner of Food and Drugs
U.S. Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993-0002

Dear Dr. Hamburg:

Relief from pain is important to millions of individuals who suffer from chronic illness, and prescription drugs such as opioids have proven useful. However, the abuse of prescription drugs is a significant danger and has reached epidemic levels in many of our states.

Against this background, the development of tamper-resistant drugs provides an opportunity. Adding new physical and chemical features to prescription opioids to deter abuse could reduce misuse of these drugs and the sometimes deadly consequences. These products can be part of a comprehensive approach which should include prevention, interdiction, prosecution and substance-abuse treatment.

In our states, nonmedical users are shifting away from the new tamper-resistant formulations to non-tamper-resistant formulations of other opioids as well as to illegal drugs. There is great concern in our law enforcement community that many non-tamper-resistant products are available for abuse when only a few products have been formulated with tamper-resistant features.

As a specific example, we are concerned with the possibility that generic versions of extended-release opioid prescription drugs and other non-tamper-resistant products may reach the market. We applaud the FDA for expeditiously proposing guidelines establishing clear standards for manufacturers who develop and market tamper- and abuse-resistant opioid products while considering incentives for undertaking the research and development necessary to bring such products to market. Most importantly, we encourage the FDA to assure that generic versions of such products are designed with similar features.

Sincerely,

Luther Strange
Luther Strange
Alabama Attorney General

Pamela Jo Bondi
Pam Bondi
Florida Attorney General

2030 M Street, NW
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Phone: (202) 326-6000
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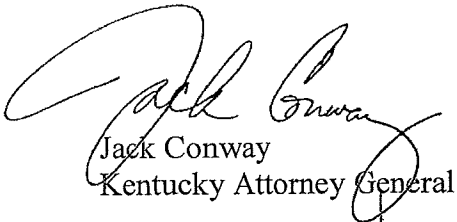
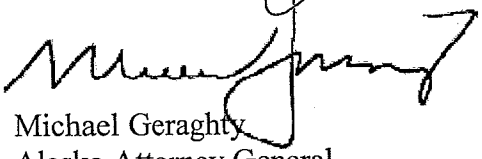
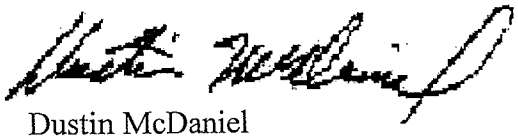


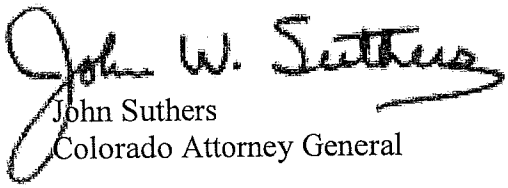
Jack Conway
Kentucky Attorney General



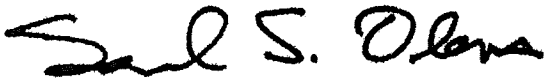
Michael Geraghty
Alaska Attorney General



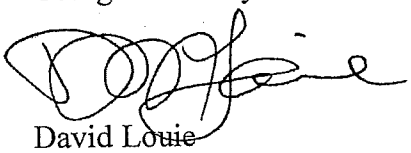
Dustin McDaniel
Arkansas Attorney General



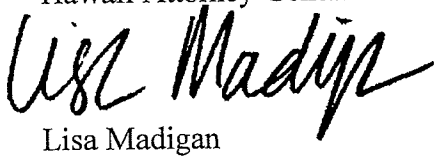
John Suthers
Colorado Attorney General



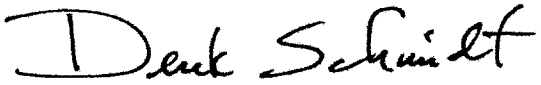
Sam Olens
Georgia Attorney General



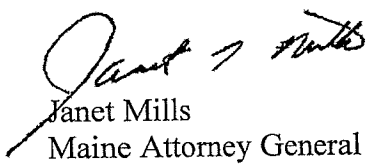
David Louie
Hawaii Attorney General



Lisa Madigan
Illinois Attorney General

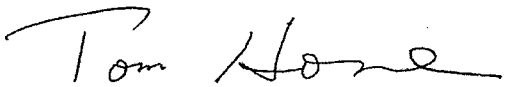


Derek Schmidt
Kansas Attorney General

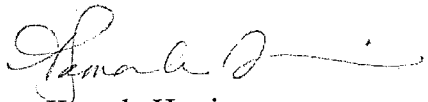


Janet Mills
Maine Attorney General

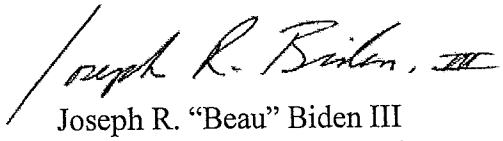
Roy Cooper
North Carolina Attorney General



Tom Horne
Arizona Attorney General

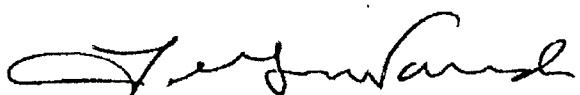


Kamala Harris
California Attorney General



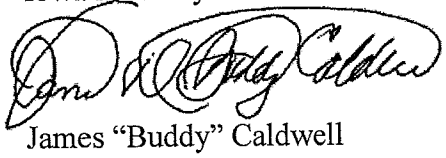
Joseph R. "Beau" Biden III
Delaware Attorney General

Lenny Rapadas
Guam Attorney General

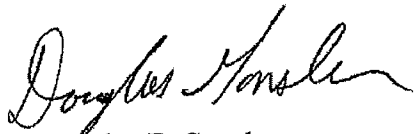


Lawrence Wasden
Idaho Attorney General

Tom Miller
Iowa Attorney General

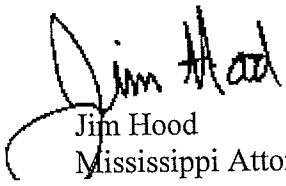


James "Buddy" Caldwell
Louisiana Attorney General



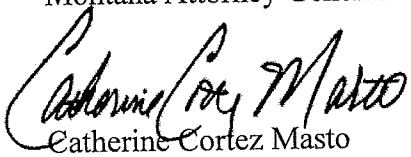
Douglas F. Gansler
Maryland Attorney General

Martha Coakley
Massachusetts Attorney General

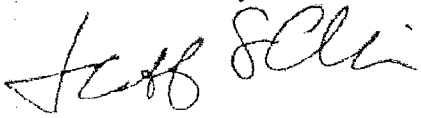


Jim Hood
Mississippi Attorney General

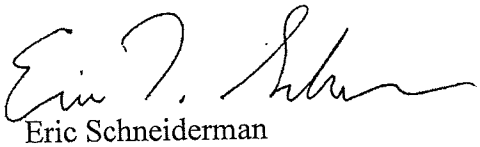
Tim Fox
Montana Attorney General



Catherine Cortez Masto
Nevada Attorney General



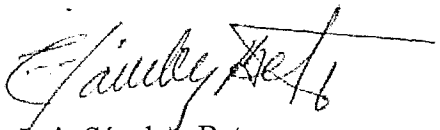
Jeffrey Chiesa
New Jersey Attorney General



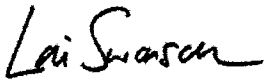
Eric Schneiderman
New York Attorney General

Mike DeWine
Ohio Attorney General

Ellen Rosenblum
Oregon Attorney General

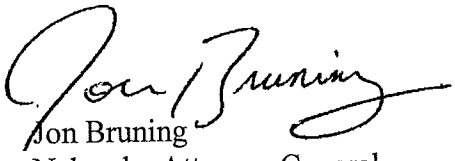


Luis Sánchez Betances
Puerto Rico Attorney General

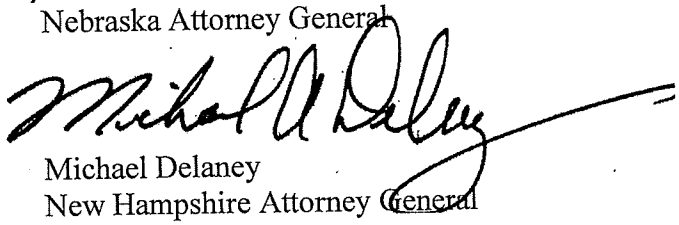


Lori Swanson
Minnesota Attorney General

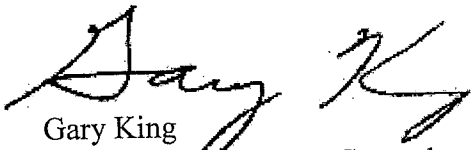
Chris Koster
Missouri Attorney General



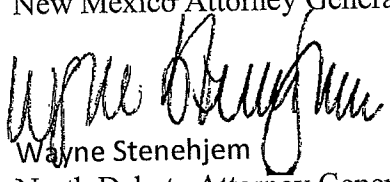
Jon Bruning
Nebraska Attorney General



Michael Delaney
New Hampshire Attorney General

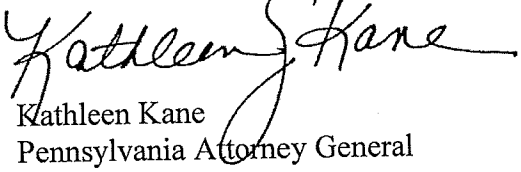


Gary King
New Mexico Attorney General

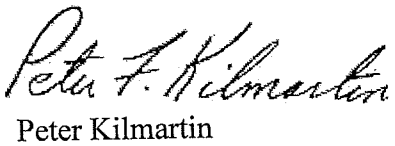


Wayne Stenehjem
North Dakota Attorney General

Scott Pruitt
Oklahoma Attorney General



Kathleen Kane
Pennsylvania Attorney General



Peter Kilmartin
Rhode Island Attorney General

Alan Wilson
South Carolina Attorney General

Robert E. Cooper, Jr.
Tennessee Attorney General

John Swallow
Utah Attorney General

Bob Ferguson
Washington Attorney General

J.B. Van Hollen
Wisconsin Attorney General

Marty J. Jackley
South Dakota Attorney General

Greg Abbott
Texas Attorney General

William H. Sorrell
Vermont Attorney General

Patrick Morrisey
West Virginia Attorney General

Greg Phillips
Wyoming Attorney General

Bluefield Daily Telegraph

Fighting an epidemic

Attorney General response a necessity

When it comes to fighting the rampant prescription drug abuse epidemic, all available resources should be utilized in dealing with this deadly scourge. That's why the latest efforts by West Virginia Attorney General Patrick Morrisey — and 47 other attorney generals across the nation — are necessary and welcomed.

Morrisey, the Republican attorney general serving the Mountain State, has joined with 46 other attorney generals in asking the U.S. Food and Drug Administration to ensure that generic manufacturers of opioid prescription drugs use tamper-resistant and abuse-resistant formulations.

Also Friday, U.S. Rep. Nick Rahall, D-W.Va., announced he was co-sponsoring the Stop Tampering of Prescription Pills Act with U.S. Rep. Hal Rogers, R-Ky., and U.S. Rep. William Keating, D-Mass. The measure would require opioid-based prescription drugs to include abuse-deterrent technologies that prevent substance abusers from crushing or dissolving prescription opioids so that they cannot be inhaled or injected to achieve an immediate high.

Morrisey and Rahall both correctly note that the development of tamper-resistant opioid-based prescription pain relievers help to deter abuse and can be a part of a comprehensive approach when combined with prevention, interdiction, prosecution and substance-abuse treatment.

"Like many other states and territories, West Virginia suffers from an epidemic of prescription drug abuse," Morrisey said Tuesday. "The most recently available information from the Centers for Disease Control shows the Mountain State had one of the highest rates of drug overdose deaths in the nation in 2008 with more than 25 deaths per 100,000 people. That is a very sad and scary statistic that is made all the worse when you think of the families and lives forever changed by this plague."

❑❑❑

And the prescription drug-abuse problem has become increasingly rampant right here in the coalfields, including Mercer and McDowell counties.

And the prescription drug-abuse problem has become increasingly rampant right here in the coalfields, including Mercer and McDowell counties. That's why action from all elected officials — both on the state and federal level — is critical in fighting this epidemic. Law enforcement, concerned citizens and the community as a whole also must play a critical role in helping to slow and ultimately stop this deadly tide.

Morrisey and the 46 other attorney generals say they are concerned that non-medical users are shifting away from the new tamper-resistant formulations to non-tamper-resistant formulas of other opioids as well as to illegal drugs.

The FDA must act quickly on the request by Morrisey and the 46 other attorney generals. And the U.S. House of Representatives must pass the bipartisan STOPP Act introduced by Rahall, Rogers and Keating. There is no room or time for politics when it comes to fighting the deadly epidemic of prescription drug abuse.

The Parkersburg News and Sentinel

Morrisey turns attention to prescription drug abuse

PARKERSBURG – The attorney general for the state of West Virginia is asking the federal Food and Drug Administration to require generic manufacturers of opioid prescription drugs to use tamper-resistant and abuse-resistant formulations.


Morrisey

A letter was sent to U.S. Food and Drug Administration Commissioner Dr. Margaret Hamburg, saying prescription drug abuse is a significant danger and has reached epidemic levels in many states, Attorney General Patrick Morrisey said Tuesday. Morrisey joined with 47 other attorneys general in the letter.

The attorneys said the development of tamper-resistant opioid-based prescription pain relievers help to deter abuse and can be a part of a comprehensive approach when combined with prevention, interdiction, prosecution and substance-abuse treatment.

"Like many other states and territories, West Virginia suffers from an epidemic of prescription drug abuse," Morrisey said.

Recently available information from the Centers for Disease Control shows the Mountain State had one of the highest rates of drug overdose deaths in the nation in 2008 with more than 25 deaths per 100,000 people.

"That is a very sad and scary statistic that is made all the worse when you think of the families and lives forever changed by this plague," Morrisey said.

Alabama, Florida, Kentucky and North Carolina are the lead authors of the letter. It applauds the FDA for proposing guidelines to establish clear standards for manufacturers who develop and market tamper-resistant and abuse-resistant opioid products while considering incentives for undertaking the research and development necessary to bring such products to market.

Charleston Daily Mail

Tuesday April 23, 2013

National Prescription Drug Take-Back Day ahead

By Staff Reports

The Office of Attorney General Patrick Morrisey will partner with the Division of Protective Services to participate in the sixth National Prescription Drug Take-Back Day from 10 a.m. to 2 p.m. Saturday at the Capitol.

The federal Drug Enforcement Administration spearheads the Drug Take-Back Day, which was initially launched in 2010. Local and state law enforcement agencies collect unused medication and dispose of it in a safe way that prevents potential abuse and protects the environment.

"I would encourage everyone to take a look through their medicine cabinet and clean out any unused, unwanted or expired prescriptions and bring them to the event," Morrisey said. "Even if the medicine is not one that typically is 'abused,' it is critical that pills, liquid and other forms of prescriptions are disposed of properly. Medicine that is thrown into the trash can be found by people looking to abuse drugs, and flushing it down the toilet can damage the environment."

Prescription drug abuse is a significant problem in West Virginia and the nation. Between 1990 and 2008, the most recent year available, the rate of death from prescription drug overdose has more than tripled, according to the U.S. Centers for Disease Control and Prevention.

Promise 13 - Prosecute Election Law Fraud

Request that the Legislature clarify the role of the Attorney General and the Secretary of State so that the Attorney General gains authority to prosecute violations of ethics and election law fraud and that the Attorney General plays a more proactive role in election law policy.

Actions Taken:

✓ On April 11, 2013, Attorney General Morrisey sent a letter to leadership in both the state Senate and House of Delegates requesting that the Legislature clarify the role that the Attorney General can play in helping the Secretary of State enforce state election laws.

✓ The Attorney General has established the position of Public Integrity Officer within the Office of the Attorney General to help collaborate with county prosecutors and other state entities on corruption and election fraud cases.

✓ The Office of the Attorney General has been asked to provide advice and assistance to the West Virginia Ethics Commission on several matters involving public officials.

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
ATTORNEYGENERAL

(304) 558-2021
FAX (304) 558-0140

April 11, 2013

The Honorable Jeffrey Kessler
President of the Senate
Building 1, Room 227M
1900 Kanawha Boulevard, East
Charleston, WV 25305

The Honorable Mike Hall
Senate Minority Leader
Building 1, Room 245M
1900 Kanawha Boulevard, East
Charleston, WV 25305

RE: Legislative Requests Relating to the Office of the Attorney General

Dear President Kessler and Minority Leader Hall:

I am writing to follow up on several topics that we have discussed during this legislative session.

Last year, legislation was introduced in the House of Delegates (H.B. 4325) to grant prosecutorial powers to the Attorney General. While the House Government Organization Committee recommended passage of this legislation, it ultimately died in the House Judiciary Committee. In the upcoming months, I would like to work with both of you as well as members of the Senate and House of Delegates to reach an agreement on how we may be able to advance similar legislation. I believe such legislation would facilitate my office's ability to help address West Virginia's prescription drug abuse epidemic and enhance election law interpretation and enforcement in our state.

Clearly, we can all agree that tackling prescription drug abuse should be one of our state's top priorities. Based upon the most recently available information from the Centers for Disease Control, the Mountain State has one of the highest rates of drug overdose deaths in the nation, a sad and scary statistic that I am committed to change. Indeed, I have made fighting prescription drug abuse a top priority of my administration. As part of that effort, I recently joined with 47 other Attorneys General in a letter encouraging the U.S Food & Drug Administration (FDA) to require the use of tamper-resistant and abuse-resistant formulations for generic drugs.

Unfortunately, even if the FDA agrees with our recent letter, it will only serve as one incremental step in West Virginia's efforts to address the prescription drug abuse epidemic. We currently are analyzing a number of different ideas to address the supply and demand sides of the problem, as well as potential investigations that, when implemented, should make additional progress.

While we continue to develop our overall strategy on prescription drug abuse, we have already reached one conclusion: Additional investigative and prosecutorial attention is sorely needed. County prosecutors and law enforcement are doing everything they can to combat prescription drug abuse, but an unfortunate reality is that many counties lack sufficient resources to focus adequate attention on the issue. Further, because prescription drug abuse cuts across county lines, the coordination and prosecution of this problem across the fifty-five counties under the current enforcement regime is very challenging.

I believe that the Attorney General's Office could play a far more proactive and helpful role in combatting prescription drug abuse if we obtained explicit prosecutorial authority. We already possess civil investigative authority in this area and plan to rely upon consumer protection investigators to detect abusive prescription drug abuse patterns. Obtaining prosecutorial authority represents a logical next step for this office and would allow West Virginia law enforcement to more effectively pursue some of the criminals who currently are falling through the cracks of our state's enforcement regime.

In the area of election law enforcement, I believe expanded authority is also warranted and would complement our office's investigative capacity and knowledge of election laws. As you know, the Attorney General's office currently assists the Secretary of State when it comes to the interpretation of state election laws. For instance, our office provides legal opinions on any questions and representation to the Secretary of State's Office when state election laws are challenged in court. I am interested in exploring ways to further cement the natural working relationship between the Offices of the Secretary of State and the Attorney General by clarifying the role that the Attorney General can play in helping the Secretary of State enforce state election law.

Thank you for your consideration of the issues raised in this letter. As always, I appreciate our working relationship and look forward to any feedback you may have on these or other important topics.

Sincerely,

Patrick Morrisey
Attorney General

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
ATTORNEYGENERAL

(304) 558-2021
FAX (304) 558-0140

April 11, 2013

The Honorable Rick Thompson
Speaker of the House
Room 228M, Building 1
1900 Kanawha Boulevard, E.
Charleston, WV 25305

The Honorable Tim Armstead
Minority Leader
Room 264M, Building 1
1900 Kanawha Boulevard, E.
Charleston, WV 25305

Dear Speaker Thompson and Minority Leader Armstead:

RE: Legislative Requests Relating to the Office of the Attorney General

I am writing to follow up on several topics that we have discussed during this legislative session.

As you know, last year, legislation was introduced in the House of Delegates (H.B. 4325) to grant prosecutorial powers to the Attorney General. While the House Government Organization Committee recommended passage of this legislation, it ultimately died in the House Judiciary Committee. In the upcoming months, I would like to work with both of you as well as members of the House of Delegates and the Senate to reach an agreement on how we may be able to advance similar legislation. I believe such legislation would facilitate my office's ability to help address West Virginia's prescription drug abuse epidemic and enhance election law interpretation and enforcement in our state.

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Thank you for your consideration of the issues raised in this letter. As always, I appreciate our working relationship and look forward to any feedback you may have on these or other important topics.

Sincerely,

Patrick Morrisey

Patrick Morrisey
Attorney General

the Charleston Gazette
THE STATE NEWSPAPER

January 9, 2013

Incoming attorney general sets up integrity unit

Morrisey plans to collaborate on public corruption cases

By Eric Eyre

CHARLESTON, W.Va. -- West Virginia Attorney General-elect Patrick Morrisey plans to establish a "public integrity unit" that will team up with county prosecutors to crack down on corruption, Morrisey said at a news conference at the state Capitol Wednesday.

Morrisey, who takes office next week, said lawyers in his office could work as special prosecutors, assisting county prosecuting attorneys with investigations of state and local officials.

"We'll be partnering up, collaborating with county prosecutors," said Morrisey, a Republican who defeated longtime Democratic Attorney General Darrell McGraw in the November election.

Kanawha County Prosecuting Attorney Mark Plants said he has talked twice with Morrisey during the past month.

Under state law, West Virginia's attorney general has no authority to prosecute criminal cases.

"I'll gladly work with Mr. Morrisey, but at the end of the day, only my office and the U.S. Attorneys Office have the authority to prosecute in Kanawha County," Plants said. "I'm certainly not going to give up the job I was elected to do. The AG's office has no prosecutorial powers."

Morrisey also talked Wednesday morning with U.S. Attorney Booth Goodwin about his plans for the public integrity unit. Goodwin's office prosecutes the bulk of public corruption cases in Southern West Virginia.

Goodwin said he hopes to keep an "open line of communication" with Morrisey's office.

"I listened to his proposals. In no way, shape or form did I endorse them," Goodwin said. "I offered no opinion on what he planned to do. That's not my place."

At Wednesday's news conference, Morrisey named Marty Wright to head up the new public integrity unit. Wright formerly worked as a lawyer with the state Ethics Commission. He previously served as an assistant prosecutor in Ohio County.

As deputy attorney general/public integrity officer, Wright also will be responsible for overseeing ethics reforms within the Attorney General's office.

During the campaign, Morrisey pledged to ban the use of self-promoting trinkets, and he vowed to prohibit the use of any "broad-based" office advertising six months before the next election.

Morrisey said Wright also would oversee a new competitive bidding system for selecting lawyers who contract with the Attorney General's office.

Other Morrisey hires announced Wednesday include:

• Dan Greear, chief counsel. Greear, a former legislator, ran unsuccessfully for West Virginia attorney general in 2008. He also lost a race for Kanawha circuit judge in 2010.

• Elbert Lin, solicitor general. Lin, a Washington D.C., lawyer, was a former clerk to conservative U.S. Supreme Court Justice Clarence Thomas. Morrisey said Lin has a national reputation as a "top-flight constitutional and appellate advocate."

The Attorney General's office has never previously employed a solicitor general. Lin will oversee the office's appeals division and challenge "overreaching" federal laws that negatively affect West Virginia, Morrisey said.

"The solicitor general will be responsible for the federal lawsuits I will be bringing," Morrisey said. "We need to be less of a show horse and more of a workhorse."

• Richie Heath, deputy attorney general. Heath is executive director of West Virginia Citizens Against Lawsuit Abuse, a group that opposed McGraw during the campaign.

• Tracy Webb, deputy attorney general. Webb formerly worked as general counsel at the West Virginia Housing Development Fund.

• Chris Dodrill, Jennifer Greenlief and Shane Wilson, assistant attorney generals. Dodrill is a Charleston city council member, Greenlief worked for a Charleston law firm, and Wilson graduated this year from West Virginia University's law school.

"We have a great deal of work to accomplish, but with the assistance of these individuals, and the many other talented people already working in the [office], it will only be a matter of time before our office is widely respected as one of the top 'law firms' in the state and country," Morrisey said in a news release. "We will always seek to recruit the best and the brightest attorneys from every part of West Virginia and the U.S. so that we can put the needs of West Virginians first."

Also Wednesday, Morrisey announced plans to hold a news conference next week during which he will "dispose of trinkets" that McGraw's office purchased with state funds and passed out to West Virginians.

"It's going to be a made-for-TV event," Morrisey promised.

COPY

STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION
210 Brooks Street, Suite 300
Charleston WV 25301 1838
(304) 558-0664 • FAX (304) 558-2169
ethics@wv.gov • www.ethics.wv.gov

February 12, 2013

The Honorable Patrick Morrissey, Attorney General
State Capitol Complex
Bldg. 1, Room E-26
Charleston, WV 25305

Dear Attorney General Morrissey:

I am writing to confirm our informal agreement. As you are aware, the Ethics Act provides for the Office of the Attorney General to assist the Ethics Commission. Specifically, W. Va. Code § 6B-2-2(e)(5) reads:

> The Commission may [r]equest appropriate agencies of state to provide any professional assistance the Commission may require in the discharge of its duties: Provided, That the Commission shall reimburse any agency other than the Attorney General the cost of providing assistance....

As you know, when you took office, Ethics Commission Deputy General Counsel Martin J. Wright left our office to begin work for you. Among his assignments here were two verified ethics complaints that were scheduled for public hearing (administrative trial) beginning January 28, 2013. Needless to say, the public hearing has been continued and a status conference has been scheduled for February 18, 2013.

Pursuant to W. Va. Code § 6B-2-2(e)(5), I hereby request that you provide such professional assistance by assigning Mr. Wright to continue to provide assistance in—including, without limitation, the prosecution thereof—the aforementioned consolidated complaints, to wit: VCRB 2009-09 and VCRB 2011-04, Melvin Kessler v. Mayor Emmett S. Pugh, III, Beckley, WV, along with various other confidential complaint matters. (I have enclosed a copy of the Statement of Charges related to the Pugh complaints for your review.)

Under this arrangement, the Ethics Commission retains jurisdiction over any complaints for which Mr. Wright may provide professional assistance. The Ethics Commission, by its Executive Director as duly authorized representative, shall establish the objectives of representation related to each such complaint, and as required by the West Virginia Rules of Professional Conduct, the Attorney General's Office, through Mr. Wright, shall abide by the Ethics Commission's decisions concerning the objectives of representation

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and shall consult with the Commission as to the means by which they are to be pursued. WVRPC, Rule 1.2. Before committing the Ethics Commission to a course of action, either in the administrative prosecution or settlement of a complaint, Mr. Wright shall consult with the Ethics Commission's Executive Director to obtain approval therefor.

Please respond in writing by February 28, 2013 advising whether you will honor the Ethics Commission's request set forth herein. If you have any questions, please feel free to contact me. Thank you for your cooperation. I look forward to hearing from you.

Sincerely,

Theresa M. Kirk
Executive Director

Enclosure: Statement of Charges - VCRB 2009-09 and VCRB 2011-04, Melvin Kessler v. Mayor Emmett S. Pugh, III, Beckley, WV

Promise 14 - Educate West Virginians on Healthcare

Work with the Department of Health and Human Resources to conduct consumer education forums about the State's Medicaid Program, Medicare enrollment issues, and any other existing health care programs in place.

Actions Taken:

✓ On April 18, 2013, Attorney General Morrisey partnered with the West Virginia Department of Health and Human Resources (WV DHHR) to host the first in a series of telephone town hall meetings aimed at educating consumers and seniors on important issues regarding West Virginians' rights and responsibilities on healthcare matters.

✓Nearly 1,700 seniors participated in the Attorney General's telephone town hall event, in which the Attorney General and a representative from WV DHHR answered questions on a number of topics, including, but not limited to the following:

- ✓ Funding for Medicare and Medicaid Services;
- ✓ Prescription Drug Coverage under Medicare Part B;
- ✓ Subsidy Programs Available for West Virginians;
- ✓ Open-enrollment for Health Care Programs;

✓ Attorney General Morrisey and staff have also met with WV DHHR to discuss additional ways in which they can work together to better educate the public on important healthcare issues.

✓ The Attorney General's Office will be planning additional informational sessions in the upcoming months. As a separate matter, the Office will be sending letters soon to the Obama administration about the problems consumers are expected to see under the Affordable Care Act.

Promise 15 - Defend Second Amendment Rights

Accelerate state reciprocity agreements on concealed carry permits to advance our Second Amendment protections.

Actions Taken:

✓ S.B. 369 was passed by the Legislature on April 13, 2013, and is expected to be signed into law by the Governor. As a result of the bill's passage, the Office of the Attorney General is preparing to communicate with states in the coming weeks to seek additional reciprocity agreements.

✓ Attorney General Morrisey's staff worked closely with the Legislature on S.B. 369, which will increase reciprocity rights for West Virginians and improve the ability of the Attorney General's Office to enter into future reciprocity agreements.

✓ On April 4, 2013, Attorney General Morrisey sent a letter to leadership in the House of Delegates encouraging action on S.B. 369. Attorney General Morrisey explained how the legislation would advance the Second Amendment protections afforded to all West Virginians by helping eliminate existing impediments to obtaining additional reciprocity agreements with other states.

✓ The Office of the Attorney General also has collaborated with the Legislature on other proposed legislation to ensure that existing reciprocity agreements aren't negatively impacted.

✓ The Attorney General's Office joined with nineteen other states in filing a "friend of the court" brief in a case before the United States Supreme Court on the constitutionality of a New York statute that limits individual rights under the Second Amendment.

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 369

(By Senators Unger, Kessler (Mr. President), D. Hall, Cookman, Cann, Laird, Beach, Fitzsimmons, Jenkins and Williams)

[Originating in the Committee on the Judiciary; reported March 27, 2013.]

A BILL to amend and reenact §61-7-6 and §61-7-6a of the Code of West Virginia, 1931, as amended, all relating to allowing a resident of another state to carry a handgun in West Virginia if the person holds a valid permit or license to possess or carry a handgun from the other state and the other state allows residents of West Virginia who are licensed in West Virginia to carry a

concealed deadly weapon to carry a concealed deadly weapon in that state.

Be it enacted by the Legislature of West Virginia:

That §61-7-6 and §61-7-6a of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 7. DANGEROUS WEAPONS.

§61-7-6. Exceptions as to prohibitions against carrying concealed deadly weapons.

The licensure provisions set forth in this article do not apply to:

(1) Any person:

(A) Carrying a deadly weapon upon his or her own premises; ~~nor shall anything herein prevent a person from~~

(B) Carrying ~~any~~ a firearm, unloaded, from the place of purchase to his or her home, residence or place of business or to a place of repair and back to his or her home, residence or place of business; ~~nor shall anything herein prohibit a person~~ or

(C) From possessing a firearm while hunting in a lawful manner or while traveling from his or her home, residence or place of business to a hunting site and returning to his or her home, residence or place of business;

(2) Any person who is a member of a properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this state or from the United States for the purpose of target practice from carrying any pistol, as defined in this article, unloaded, from his or her home, residence or place of business to a place of target practice and from any place of target practice back to his or her home, residence or place of business, for using any such weapon at a place of target practice in training and improving his or her skill in the use of the weapons;

(3) Any law-enforcement officer or law-enforcement official as defined in section one, article twenty-nine, chapter thirty of this code;

(4) Any employee of the West Virginia Division of Corrections duly appointed pursuant to the provisions of section five, article five, chapter twenty-eight of this code while the employee is on duty;

Final Version Not Yet Available Online

(5) Any member of the armed forces of the United States or the militia of this state while the member is on duty;

(6) Any circuit judge, including any retired circuit judge designated senior status by the Supreme Court of Appeals of West Virginia, prosecuting attorney, assistant prosecuting attorney or a duly appointed investigator employed by a prosecuting attorney;

(7) Any resident of another state who holds a valid permit or license to possess or carry a ~~concealed weapon~~ handgun issued by a state or a political subdivision ~~which has entered into a reciprocity agreement with this state,~~ subject to the provisions and limitations set forth in section six-a of this article;

(8) Any federal law-enforcement officer or federal police officer authorized to carry a weapon in the performance of the officer's duty; and

(9) Any Hatfield-McCoy Regional Recreation Authority Ranger while the ranger is on duty.

§61-7-6a. Reciprocity and recognition; out-of-state concealed handgun permits.

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(a) A ~~holder of a~~ valid out-of-state permit or license to possess or carry a ~~concealed~~ handgun ~~as issued by another state with which the State of West Virginia has executed a reciprocity agreement shall be recognized as~~ is valid in this state for the carrying of a concealed handgun, if the following conditions are met:

(1) The permit or license holder is twenty-one years of age or older;

(2) The permit or license is in his or her immediate possession;

(3) The permit or license holder is not a resident of the State of West Virginia; and

(4) ~~The State of West Virginia has executed a valid and effective reciprocity agreement with the issuing state pertaining to the carrying and verification of concealed handgun licenses and permits issued in the respective states.~~ The Attorney General has been notified by the Governor of the other state that the other state allows residents of West Virginia who are licensed in West Virginia to carry a concealed deadly weapon to carry a concealed deadly weapon in that state or the Attorney General has entered into a written reciprocity agreement with the appropriate official of the other state whereby the state agrees to

Final Version Not Yet Available Online

honor West Virginia concealed handgun licenses in return for same treatment in this state.

(b) A holder of a valid permit or license from another state who is authorized to carry a concealed handgun in this state pursuant to provisions of this section is subject to the same laws and restrictions with respect to carrying a concealed handgun as a resident of West Virginia who is so permitted, and must carry the concealed handgun in compliance with the laws of this state.

(c) A license or permit from another state is not valid in this state if the holder is or becomes prohibited by law from possessing a firearm.

(d) The West Virginia Attorney General shall seek to obtain recognition of West Virginia concealed handgun licenses and enter into and ~~may~~ execute reciprocity agreements on behalf of the State of West Virginia with states ~~which meet the following standards and requirements:~~

~~(1) The standards applied by the other state before issuing a concealed handgun license or permit must be similar to or greater than the standards imposed by this article;~~

~~(2) This state's law-enforcement officers have continuous access to databases on the criminal information network, 8twenty-four hours per day, seven days per week, to verify the continued validity of any license or permit to carry a concealed handgun that has been granted by the issuing state;~~

~~(3) The other state agrees to grant the right to carry a concealed handgun to residents of West Virginia who have valid concealed handgun permits issued pursuant to this article in their possession while carrying concealed weapons in that state; and~~

~~(4) The states agree to apprise one another of changes in permitting standards and requirements, to provide for a prompt reexamination of whether any adopted change in licensing or permitting standards negates the states' ability to continue with the reciprocity agreement.~~ for the recognition of concealed handgun permits issued pursuant to this article.

(e) The West Virginia State Police shall maintain a registry of states with which the State of West Virginia has entered into reciprocity agreements or which recognize West Virginia concealed handgun licenses on the criminal information network and make the

registry available to law-enforcement officers for investigative purposes.

(f) Every twelve months after the effective date of this section, the West Virginia Attorney General shall make written inquiry of the concealed handgun licensing or permitting authorities in each other state as to: (i) Whether a West Virginia resident may carry a concealed handgun in their state based upon having a valid West Virginia concealed handgun permit; and (ii) whether a West Virginia resident may carry a concealed handgun in that state based upon having a valid West Virginia concealed handgun permit, pursuant to the laws of that state or by the execution of a valid reciprocity agreement between the states.

(g) The West Virginia State Police shall make available to the public a list of states which have entered into reciprocity agreements with the State of West Virginia or that allow residents of West Virginia who are licensed in West Virginia to carry a concealed deadly weapon to carry a concealed deadly weapon in that state.

(NOTE: The purpose of this bill is to provide full faith and credit to a nonresident who has a permit or license to carry a handgun in his or her state when that state allows residents of West Virginia who are licensed in West Virginia to carry a concealed deadly weapon to carry a concealed deadly weapon in that other state.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.)

Final Version Not Yet Available Online

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
ATTORNEYGENERAL

(304) 558-2021
FAX (304) 558-0140

April 4, 2013

The Honorable Rick Thompson
Speaker of the House of Delegates
Building 1, Room 228 M
State Capitol Complex
Charleston, WV 25305

Dear Speaker Thompson:

I am writing to express my support for S.B. 369, which seeks to facilitate concealed handgun reciprocity agreements and recognition between West Virginia and other states.

As you are aware, the Office of the Attorney General is responsible for entering into reciprocity agreements with other states pursuant to W.Va. Code § 61-7-6a. At present, West Virginia has full reciprocity agreements in place with twenty-four states. Another eight states formally recognize West Virginia concealed handgun permits, allowing West Virginians with valid concealed handgun licenses to carry concealed handguns in those states.

However, current provisions of our state code serve as an impediment to obtaining additional reciprocity agreements with several states. For instance, the current provisions of W.Va. Code § 61-7-6a that explicitly require the execution of a written reciprocity agreement tend to preclude reciprocity with some states which lack the authority to enter into such written agreements.

My office is committed to expanding the recognition of West Virginia concealed carry permits, as it would advance the Second Amendment protections afforded to all West Virginians. To advance this goal, my staff has worked closely with the Senate Judiciary Committee on S.B. 369. As such, I recommend its passage by the House of Delegates.

S.B. 369, as passed by the Senate, would increase reciprocity rights for West Virginians and improve the ability of the Attorney General's Office either to enter into future agreements or seek mutual recognition in the absence of authority to enter a formal agreement.

Please feel free to contact me if you would like to discuss this legislation, as the Office of the Attorney General would be willing to provide any information you need in furtherance of this important bill.

Sincerely,

Patrick Morrisey
Attorney General

c: The Honorable Tim Armstead
The Honorable John Ellem
The Honorable Tim Miley

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CHARLESTON, WEST VIRGINIA 25305

PATRICK MORRISEY
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April 4, 2013

The Honorable Tim Armstead
Minority Leader House of Delegates
Building 1, Room 264M
State Capitol Complex
Charleston, WV 25305

Dear Minority Leader Armstead:

I am writing to express my support for S.B. 369, which seeks to facilitate concealed handgun reciprocity agreements and recognition between West Virginia and other states.

As you are aware, the Office of the Attorney General is responsible for entering into reciprocity agreements with other states pursuant to W.Va. Code § 61-7-6a. At present, West Virginia has full reciprocity agreements in place with twenty-four states. Another eight states formally recognize West Virginia concealed handgun permits, allowing West Virginians with valid concealed handgun licenses to carry concealed handguns in those states.

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Sincerely,

Patrick Morrisey
Attorney General

c: The Honorable Rick Thompson
The Honorable John Ellem
The Honorable Tim Miley

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April 4, 2013

The Honorable Tim Miley
House of Delegates
Building 1, Room 418M
State Capitol Complex
Charleston, WV 25305

Dear Delegate Miley:

I am writing to express my support for S.B. 369, which seeks to facilitate concealed handgun reciprocity agreements and recognition between West Virginia and other states.

As you are aware, the Office of the Attorney General is responsible for entering into reciprocity agreements with other states pursuant to W.Va. Code § 61-7-6a. At present, West Virginia has full reciprocity agreements in place with twenty-four states. Another eight states formally recognize West Virginia concealed handgun permits, allowing West Virginians with valid concealed handgun licenses to carry concealed handguns in those states.

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Sincerely,

Patrick Morrisey
Attorney General

c: The Honorable Rick Thompson
The Honorable Tim Armstead
The Honorable John Ellem

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April 4, 2013

The Honorable John Ellem
House of Delegates
Building 1, Room 150R
State Capitol Complex
Charleston, WV 25305

Dear Delegate Ellem:

I am writing to express my support for S.B. 369, which seeks to facilitate concealed handgun reciprocity agreements and recognition between West Virginia and other states.

As you are aware, the Office of the Attorney General is responsible for entering into reciprocity agreements with other states pursuant to W.Va. Code § 61-7-6a. At present, West Virginia has full reciprocity agreements in place with twenty-four states. Another eight states formally recognize West Virginia concealed handgun permits, allowing West Virginians with valid concealed handgun licenses to carry concealed handguns in those states.

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Sincerely,

Patrick Morrisey
Attorney General

c: The Honorable Rick Thompson
The Honorable Tim Armstead
The Honorable Tim Miley

No. 12-845

In The Supreme Court of the United States

ALAN KACHALSKY, *et al.*,

Petitioners,

v.

SUSAN CACACE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, MICHIGAN, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

RULES

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY OF AMICI TO FILE[1]

The Commonwealth of Virginia, pursuant to Sup. Ct. R. 37(2)(a), and other States, file this Amicus Brief in support of the Petitioners' petition for a writ of certiorari because N.Y. Penal Law § 400.00(2)(f), improperly trenches upon the Second Amendment. The Amici have an interest in this Court holding that the self-defense interest animating the Second Amendment's individual right to keep and bear arms applies broadly beyond the confines of an individual's home and that no government may condition the exercise of this constitutional right on a ex ante showing of cause. Because this Court's interpretation of the federal constitutional right will affect the constitutional rights of Amici States' citizens with regard to the federal government and with regard to other States as they travel, the Amici States urge this Court to interpret the scope of the right and to apply a standard of review to its infringement that will recognize the inherent right of all citizens of the United States to "bear arms" and so lawfully and effectually protect themselves from unlawful violence.

United States Supreme Court Rule 37(4) authorizes State Attorneys General to file as amici on

---

[1] On January 23, 2013, counsel of record for petitioners and respondents received timely notice of Amici States' intent to file this brief to which each consented. Sup. Ct. R. 37(2)(a).

behalf of their State without consent of the parties or further leave of this Court.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The petition places before the Court multiple issues central to the practical import of the individual right of self-defense protected by the Second Amendment. On these matters, the courts of appeals and other courts are divided, including on whether the Second Amendment's right to bear arms extends to areas outside the home. *See* (Pet. 12-13, nn.3-4, 18 n.6). These issues bear on a fundamental aspect of the liberty interest. *See District of Columbia v. Heller*, 554 U.S. 570, 606 (2008) (quoting St. George Tucker's notes on the Second Amendment in his "version of Blackstone's Commentaries" to the effect that the right is "'the true palladium of liberty. . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.'"); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038 (2010) (citing a similar statement in Justice Joseph Story's *Commentaries on the Constitution of the United States*). The right to keep and bear arms

continues to be popularly understood as central to the continuation of a free society. Rasmussen Reports, *65% see gun rights as protection against tyranny*, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control/65_see_gun_rights_as_protection_against_tyranny_control/65_see_gun_rights_as_protection_against_tyranny (Jan. 18, 2013).

Nevertheless, a handful of States like New York have lost sight of the Amendment's "guarantee [to] the individual [of the] right to possess and carry weapons in case of confrontation," *Heller,* 554 U.S. at 592, even imposing some outright bans. *See* D.C. Code §§ 22-4504 to -4504.02; 720 Ill. Comp. Stat. 5/24-1(a)(4); *cf. Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding Illinois' ban on carrying handguns in public to violate the Second Amendment). New York's brand of animus to Second Amendment rights also has been enacted by the States of California, Cal. Penal Code § 26150(a) (requiring, inter alia, "good cause"), Maryland, Md. Code Ann., Pub. Safety § 5-306(a)(1)-(5) (requiring, inter alia, "good and substantial reason"), and New Jersey, N.J. Stat. Ann. § 2C:58-4(c) (requiring, inter alia, a "justifiable need"), all of which are in litigation. *See McKay v. Hutchens*, No. 12-57049 (9th Cir.) (notice of appeal filed November 9, 2012); *Muller v. Maenza*, No. 12-1550 (3d Cir.) (awaiting oral argument); *Woollard v. Gallagher*, No. 12-1437 (4th Cir.) (argued October 24, 2012).

In the wake of the Seventh Circuit's decision in *Moore*, Illinois is being counseled to follow New York's

standard as well. *See Editorial: Madigan Should Appeal Gun Ruling*, Chicago Sun-Times, Dec. 11, 2012, *available at* http://www.suntimes.com/opinions/16952377-474/editorial-madigan-should-appeal-gun-ruling.html ("the Legislature could consider a narrowly crafted law, such as that in New York, which has concealed carry in theory but does not grant many permits."). The petition thus presents the Court with an excellent vehicle to resolve two of the most contested aspects of Second Amendment jurisprudence: (1) whether its protections apply with equal force outside the home, and (2) whether governments may condition the right of persons that are law-abiding upon a demonstration of particular "need."

Not only does a need to exercise a right requirement uniquely treat Second Amendment rights as disfavored, the New York requirement considers the self-defense component of those rights as being of a lower order than "carry[ing] a handgun for target practice or hunting." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). (App. 3, 9.)

Furthermore, the Second Circuit did not employ a meaningful standard of review. In view of the less-restrictive alternatives available to New York to address safety concerns, demonstrated by the experience of a majority of the States who have honored their citizens' self-defense rights, and by empirical research showing that right-to-carry laws do not result in criminal violence or public safety lapses, respondents cannot carry their burden to justify New York's broad

restriction. Hence, the judgment of the Second Circuit should be reviewed and reversed.

ARGUMENT

I. The Second Circuit's Categorical Distinction Between Bearing Arms Outside the Home and Keeping Arms Within the Home Finds No Support in the Constitution's Text, Breaks with This Court's Recognition that the Second Amendment Enshrines a Right to Self-Defense, and Conflicts with the Holding of the Seventh Circuit and Other Courts that the Right to Bear Arms Outside the Home Enjoys Robust Second Amendment Protection.

The Second Amendment *reads*: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep *and bear* Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). As this Court noted in *Heller*, "[i]n interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Heller*, 554 U.S. at 576 (citation omitted). The conjunctive "and" leaves no room for decoupling the right "to keep" from the right "to bear" or in affording categorically less protection to the latter activity. *Id.* at 592 (the Second Amendment "guarantee[s] the individual right to possess and carry weapons

in case of confrontation."); *id.* at 584 ("At the time of the founding, as now, to 'bear' meant to 'carry.'"); *cf. Moore*, 702 F.3d at 936 ("[c]onfrontations are not limited to the home," and the Second Amendment applies with equal force to "a loaded gun outside the home"). Thus, the Second Circuit's holding that handgun carry in public by law-abiding citizens "falls outside the core Second Amendment protections," *Kachalsky*, 701 F.3d at 94 (App. 26), conflicts with both the reasoning of this Court in *Heller*, 554 U.S. at 592, and *McDonald*, 130 S. Ct. at 3044, as well as the reasoning of the Seventh Circuit, *Moore*, 702 F.3d at 937 ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald.*"), and so merits this Court's review. *See* Sup. Ct. R. 10(a) and (c).

This petition also presents the Court with a court of appeals adopting a construction of the Second Amendment that would render nugatory a "right of the people" by excessively deferring to the transitory policy determinations of the people's current representatives with respect to the right's effect on "public safety and crime prevention." *Kachalsky*, 701 F.3d at 98; *see McDonald*, 130 S. Ct. at 3045 (plurality opinion) (rejecting "public safety" arguments against incorporation of the Second Amendment); *Heller*, 554 U.S. 570. (App. 33.) Accordingly, the Court should grant this petition and again reject any construction of its protections that permits a government to deny a particular law-abiding citizen, objectively competent in the use of arms, the right "to bear arms" for defense.

Compare Heller, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."), *with Kachalsky*, 701 F.3d at 100 (recognizing "that the need for self-defense may arise at any moment without prior warning," but affirming a requirement that a citizen "show[] that there is an objective threat to a person's safety – a 'special need for self-protection' – before granting a carry license" on the ground that "New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation"). (App. 41-42.) "'The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.'" *McDonald*, 130 S. Ct. at 3050 (plurality opinion) (quoting *Heller*, 554 U.S. at 634).

The court below, noting that "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," and assuming "that the Amendment must have ***some*** application in the very different context of the public possession of firearms," nonetheless deferred to the legislature's judgment that only law-abiding citizens who could prove that they had been threatened were entitled to "carry weapons in case of confrontation." *Kachalsky*, 701 F.3d at 88-89 & n.10, 93, 97-98. (App. 16, 24-25, 33.) The court of appeals reached this result by reading *Heller*, and the

Second Amendment, for the least that they could grammatically stand for. Furthermore, it stretched and reached for distinctions that in their insubstantiality reveal an animus against the very right at issue. For example, it treated as "a critical difference" the New York's statute's application "to carry[ing] handguns only ***in public***," while the District of Columbia's restriction struck down in *Heller* "applied ***in the home***." *Kachalsky*, 701 F.3d at 94. (App. 27.) The Second Circuit also cited this Court's inapposite case law respecting searches of the home and prosecution for possessing obscenity, and engaging in sexual conduct, within the home. *Id.* at 94. (App. 27-28.)

The Second Circuit's historical analysis was also discordant with that of *Heller*, *McDonald* and the Seventh Circuit in *Moore*, in relying on the fact that some 19th century courts upheld against constitutional challenge laws passed limiting the right to carry firearms concealed. However, the Second Circuit conceded that no court had addressed such a broad limitation as New York's, effectively prohibiting its citizenry from either open or concealed carry. *Id.* at 91, 94-96 ("[T]he cited sources do not directly address the specific question before us[.]"). (App. 20.) The Second Circuit appears to have concluded that, in the absence of a holding striking such a statute down, a State was therefore within its authority to limit Second Amendment rights in this unusual, bureaucratic way. Accordingly, the Second Circuit pronounced that "state regulation of the use of firearms in public was 'enshrined with[in] the scope' of the

Second Amendment when it was adopted," and proceeded to apply what it denominated "intermediate scrutiny." *Id.* at 96 (alteration in original) (quoting *Heller*, 554 U.S. at 634). (App. 26, 30-33.)

The Second Circuit then concluded that New York's decision "not to ban handgun possession, but to limit it to those individuals who have an actual reason . . . to carry the weapon," "rather than [a] merely speculative or specious . . . need for self-defense," "is substantially related to New York's interests in public safety and crime prevention," although plainly not "the least restrictive alternative." *Id.* at 98. (App. 36-37.) Even assuming that it could ever be constitutionally justified to advance a state interest solely by denying the vast majority of the citizenry the exercise of a constitutional right, the Second Circuit plainly did not apply heightened scrutiny as usually understood. *See Heller*, 554 U.S. at 628 n.27.

This is clear because while purporting to conduct "intermediate scrutiny," the Second Circuit neglected the necessary "fit analysis"; requiring no evidence from the State of New York that the regulation does not "'burden substantially more [protected activity] than is necessary to further the government's legitimate interests.'" *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). It also neglected the advancement requirement: "that the regulation will in fact alleviate [the recited harms] in a direct and material way." *Id.* at 664; *see Kachalsky*, 701 F.3d at 98 (refusing "to conduct a review bordering on strict scrutiny"). (App. 37.) Instead, it stated the issue as

merely "whether the proper cause requirement is substantially related to [public safety and crime prevention] interests," citing legislative reports that particular legislators believed that it was, the fact that a dwindling minority of States impose similar restrictions, and "studies and data [purportedly] demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky*, 701 F.3d at 97-99; *but see supra* Part II.B. (App. 33-38.)

Tellingly, the Second Circuit conceded that its approach was not consistent with the level of judicial protection for "any other enumerated right," *Kachalsky*, 701 F.3d at 100 (App. 41), a discriminatory approach this Court has rejected. *See McDonald*, 130 S. Ct. at 3044 (plurality opinion) (refusing to treat the "personal right to keep and bear arms for lawful purposes. . . . as a second-class right"). Instead of judicially protecting an enumerated right, the Court deferred to New York's preference for a policy over a right based on the state's claim "that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation." *Kachalsky*, 701 F.3d at 100. (App. 42.) In doing so, the Second Circuit employed a weighted interest-balancing test, deferring entirely to the judgment of the legislature that a core right can be broadly balanced against the State's ordinary

policy interests: "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments" regarding whether the right to bear arms should be limited to those who can show a "particularized interest in self defense." *Id.* at 99. (App. 38.) In this, the Second Circuit plainly treated the right to self-defense "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights' guarantees," something which it may not do. *McDonald*, 130 S. Ct. at 3044 (plurality opinion).

Everyone has, in the only relevant sense, a "particularized interest" in the exercise of their rights. First, this Court's case law, consistent with the Constitution's text, suggests no different level of constitutional protection for keeping handguns in the home than that accorded to bearing them without. Rather, it suggests the same standard should apply. *See Heller*, 554 U.S. at 592 (finding that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation" (emphasis added)); *id.* at 628 ("the inherent right of self-defense [is] central to the Second Amendment right."). While not purporting to provide an "exhaustive" list of "presumptively lawful regulatory measures," this Court in *Heller* did not include any restrictions on the general carrying of firearms by law-abiding, responsible citizens as one of the available "tools for combating [handgun violence]" or one of the lawful "measures regulating handguns." *See id.* at 626-27 & n.26, 636.

In sum, neither *Heller* nor *McDonald* contemplated governmental application of a proper cause to keep and bear arms standard to law-abiding citizens' exercise of self-defense rights. *Heller*, 554 U.S. at 635. Accordingly, New York's parsimonious approach to the right to bear arms should be found wanting. As the United States District Court for the District of Maryland, employing intermediate scrutiny to strike down Maryland's analogous restriction, so aptly put it, "[a] citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *appeal pending*, *Woollard v. Gallagher*, No. 12-1437 (4th Cir.).

Consequently, this Court should grant this petition both to make clear that the lower courts are not free "to repudiate the Court's historical analysis," *Moore*, 702 F.3d at 935, and to confirm the import of its citations in *Heller* to *Nunn* and *Andrews* that broad-brush restrictions on law-abiding citizens carrying handguns in public, whether open or concealed, premised on the view that the public is better off if citizens do not exercise their rights, run afoul of the "right of the people to . . . bear arms." *Heller*, 554 U.S. at 629; *see Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187 (1871). It should make plain that the Second Amendment took New York's "policy choice[] off the table." *Heller*, 554 U.S. at 636.

II. Because New York's Prohibition on Law-Abiding Citizens Carrying Handguns for Self-Defense Without First Demonstrating a Necessity Does Not Survive Any Level of Scrutiny More Demanding than the Rational Basis Test, This Case Presents an Excellent Vehicle to Make Clear that the Right to Bear Arms Merits Heightened Scrutiny and that the New York Law Fails.

No level of scrutiny that accords with American history and traditions or with this Court's individual rights jurisprudence could support the validity of New York's proper cause requirement. We note that this Court has rejected application of rational basis scrutiny to Second Amendment claims and has suggested that the presumption of constitutionality that figures so heavily in the Second Circuit's analysis in *Kachalsky*, 701 F.3d at 100 (App. 42), should not apply. *See Heller*, 554 U.S. at 629 n.27. In view of the experience of the States that respect their citizens' right to bear arms, and the social science literature, New York cannot demonstrate that its "proper cause" requirement is fitted to advancing the interests it asserts.

More than an Article V majority of the States, 41 at last count, *see* U.S. Const. art. V; John R. Lott, Jr., *What a Balancing Test Will Show For Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1207 (2012) (hereinafter Lott, *Right-to-Carry*), recognize their citizens' "natural right of defense 'of one's person,'" *Heller*, 554 U.S. at 585 (citation omitted), by requiring the issuance to

all law-abiding citizen applicants of a permit to carry a handgun in public. These "shall issue" permitting regimes generally require only that the applicant demonstrate the character of a law-abiding citizen reasonably proficient in the use of handguns. *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 690-91 (1995). Generally, to show that one is law-abiding, a criminal background check is performed to discover past criminal charges and convictions, including certain misdemeanors, protective orders, mental incompetency adjudications, and the like. *See, e.g.*, Fla. Stat. § 790.06(2)(a)-(g), (i)-(m), (3), (5)(a)-(e); N.M. Stat. Ann. § 29-19-4; Va. Code Ann. § 18.2-308(D) and (E)(1)-(20). Competency with a handgun may be demonstrated by showing record of completion of any number of designated training or safety courses. *See, e.g.*, Fla. Stat. § 790.06(2)(h)(1)-(7); Va. Code Ann. § 18.2-308(G)(1)-(9). It is estimated that nearly eight million Americans have been issued a permit to carry a handgun in public. *See* Lott, *Right-to-Carry*, *supra* at 1207.

Conversely, the State of New York requires a license to own or possess any handgun. *See* N.Y. Penal Law § 400.00(1). For those who meet the eligibility requirements to own a handgun and acquire a license to do so, they may carry a concealed firearm only upon a showing of proper cause. *Id.*, § 400.00(2)(f). And proper cause to carry a handgun for purposes of self-defense has been defined by the New York courts as requiring the applicant to

"'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession,'" which is not satisfied by the applicant's "living or being employed in a 'high crime area[].'" *Kachalsky*, 701 F.3d at 86-87. (App. 10.) In New York, a "'generalized desire to carry a concealed weapon to protect one's person and property does not constitute "proper cause,"'" as petitioners discovered when their applications were denied for "[f]ailure to show any facts demonstrating a need for self-protection distinguishable from that of the general public," *i.e.*, not reporting "'any type of threat to [their] own safety.'" *Id.* at 86, 88 (citation omitted). (App. 10, 13.) In short, the average, law-abiding New Yorker enjoys no legal right to bear a handgun in public for self-defense, but may engage in self-defense with a handgun only with the let and leave of local New York officials. *See* N.Y. Penal Law § 400.00(3)(a). Unsurprisingly, this regime has resulted in relatively few New Yorkers carrying. *Compare* N.Y. Div. of State Police, Firearms: Pistol Permit Bureau, http://troopers.ny.gov/Firearms/ (last visited Feb. 7, 2013), *with* U.S. Census Bureau, State & County Quick Facts: New York, http://quickfacts.census.gov/qfd/states/36000.html (last revised Jan. 10, 2013). This regime violates the plaintiffs' constitutional rights, for even average "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 630).

A. New York's Interest in Protecting the Public and Preventing Crime Does Not Justify Such a Broad Restriction.

Unquestionably, the "proper cause" requirement burdens "the core right identified in *Heller* – the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (emphases omitted) (suggesting that any abridgement of the "core right" would be subject to strict scrutiny). Although strict scrutiny should be adopted in this scenario – a crude rationing regime of the right to bear arms outside the home for law-abiding citizens who are competent to carry – this restriction is subject, at the very least, to the burden of satisfying intermediate scrutiny. Intermediate scrutiny can be met only by "demonstrating (1) that [a State] has an important governmental 'end' or 'interest' and (2) that the end or interest is substantially served by enforcement of the regulation." *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000)). Furthermore, the State may not "rely upon mere 'anecdote and supposition'" in attempting to meet its burden to show that the claimed ends are substantially served by the "proper cause" requirement. *Id.* at 418. And while the requirement, under an intermediate standard, need not be the "least restrictive means" to pass muster, it may not "substantially burden more" of the exercise of Second Amendment rights "than is necessary to further the government's legitimate interests" or "regulate . . . in such a manner that a substantial

portion of the burden on [constitutional rights] does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

New York claimed below that its requirement advances its interests in "public safety and crime prevention." *Kachalsky*, 701 F.3d at 97, 98. But the State cannot simply prohibit handguns, "the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Furthermore, the exercise of the right itself cannot be the evil to be remedied. That is, New York can claim no legitimate interest in preventing law-abiding citizens from using "handguns for the core lawful purpose of self-defense," nor may it so circumscribe that right to eliminate it for the ordinary citizen. *See id.* at 630. New York's statute is thus premised on a belief that runs contrary to our system of ordered liberty: that law-abiding citizens may not be trusted to bear arms in defense of themselves and that there is a presumption against their doing so.

The "proper cause" requirement obviously is not a proper fit for the claimed interest in reducing "widespread access to handguns in public" so as to decrease "the likelihood that felonies will result in death." *Kachalsky*, 701 F.3d at 99. Moreover, it necessarily overburdens the core right.

Other proponents of such restrictions have claimed that such requirements limit the availability of handguns to criminals. The reasoning proceeds that by prohibiting law-abiding citizens from carrying handguns in public, there will be fewer persons who

criminals can steal them from. But this rationale proves too much as it offers no justification for distinguishing between persons with proper cause and those without, or distinguishing between carriage outside the home or possession within it, and thus would justify prohibiting all persons from carrying or owning handguns, for anyone could be robbed of them. And the risk is implausible on its face, as unlike police officers who are known to keep guns, criminals are unlikely to know which law-abiding citizens do, making them difficult to target. This concern is made all the more implausible by New York's permitting only concealed rather than open carry. *See Kachalsky*, 701 F.3d at 86.

Other proponents assert that allowing persons to carry handguns outside the home does not further the self-defense interests of citizens because they might be caught off-guard and, lacking adequate training, have the gun turned upon them by an assailant. It has also been suggested that the incidence of accidents is increased by allowing more persons to carry. Such a practical elimination of the right of self-defense for most citizens because of a claimed fear that the right might be less effective than in the home is to cry crocodile tears. Moreover, requiring sufficient training, as New York does for residents of the County of Westchester only, N.Y. Penal Law § 400.00(1)(f), and as many other States do, would adequately mitigate these concerns without the wholesale abridgement of the rights of citizens. *See, e.g.*, N.C. Gen. Stat. § 14-415.12(a)(4); S.C. Code Ann.

§ 23-31-210(5); Va. Code Ann. § 18.2-308(G); W. Va. Code § 61-7-4(d).

Another argument that might be raised in the proper cause requirement's defense is that the restriction results in not authorizing carriage by citizens who subsequently use the lawful firearm unlawfully. As a matter of statistical probabilities, some portion of the persons who later commit felonies with firearms will not have previously committed a felony, and thus may be qualified at some point in their lives as law-abiding, and thus may be issued a New York carry permit but-for the proper cause requirement. Of course, a future felon could still be issued one; they are simply less likely to be, just like everyone else, because so few are issued. And plainly there is no fit at all between the proper cause requirement and the claimed concern because requiring one to receive a threat before being permitted to carry does not tend to filter out future felons (in fact, it could filter them in). And, if it chose, New York could, as other states have done, impose additional restrictions to those it already imposes that are predictive of future criminality, *see* N.Y. Penal Law § 400.00(1)(a)-(f), such as a history of involvement in a criminal gang or drug abuse. *See, e.g.*, Minn. Stat. § 624.714, subd. 2(b); N.M. Stat. Ann. § 29-19-4(A) and (B); N.C. Gen. Stat. § 14-415.12(a)(3), (b)(1)-(11); Va. Code Ann. § 18.2-308(G)(1)-(20); W. Va. Code § 61-7-4(a)(4), (5), (6), (7), and (8). There is, in any event, no evidence that New York's other restrictions do not

adequately prune from the applicant field future bad apples.

Proponents of such laws have contended that such requirements reduce the likelihood that disputes will result in the use of deadly force. It might more logically be supposed that depriving most citizens of the right of self-defense will make it more likely that confrontations with the non-law abiding will turn deadly for the law abiding. Moreover, by ensuring that persons who are subject to individualized threats have handguns, New York is already intentionally increasing the likelihood that deadly force will be employed in a confrontation. Furthermore, the policy choice to abridge the right of self-defense for most citizens in most circumstances is foreclosed by the Second Amendment itself.

Lastly, some proponents have suggested that having fewer law-abiding citizens carrying handguns in public – the natural and intended effect of the proper cause requirement – reduces interference with the ability of law enforcement to protect public safety by reducing the number of persons who police observe carrying a handgun, thus supposedly presenting fewer persons for the police to stop and speak with on suspicion of criminal activity. Again, cause requirement proponents are grasping at straws, for New Yorkers that are licensed to carry are required to do so concealed. In any case, it is a matter of some dispute in the lower courts whether suspicion that an individual is carrying a handgun, without more, justifies an investigatory stop. *See* (Pet. 16-17.)

The effect of requiring a proper fit between the dangers arising from the exercise of a right and a State's response to that danger is to ensure that the right is being appropriately valued and protected by the State. However, in the guise of protecting the public, a State may not simply eliminate that right for most people in most circumstances on the ground that it is the right itself that is the problem. *See Woollard*, 863 F. Supp. 2d at 475 ("States may not, however, seek to reduce the danger by means of widespread curtailment of the right itself.").

B. New York Cannot Show that its Restriction is a Proper One Because the Experiences of a Large Number of the States and Empirical Evidence Demonstrate that Right-to-Carry Laws Do Not Increase Criminal Violence and that Carry Restrictions on Law-Abiding Citizens Do Not Reduce Crime.

As noted previously, New York is one of merely a handful of States which require its law-abiding citizens to satisfy a State official that a handgun is needed to defend themselves in public. Instead of placing this life and death decision in the hands of an unaccountable agency, forty-one other States leave to citizens who have been determined to be law-abiding and to possess the requisite proficiency with a handgun, the decision whether they will protect themselves. With these rules having been in place for decades in some States, and their effects having been

studied since their inception, the social science research demonstrates that public carry of handguns by law-abiding citizens does not increase criminal violence or threaten public safety, but prevents crime and protects the public.

In 1987, the State of Florida adopted what has become the model for handgun carry permit laws: non-discretionary issuance of permits to carry handguns concealed in public upon a showing that the applicant was a law-abiding citizen who possessed the requisite proficiency in the handling of a handgun. *See* Fla. Stat. § 790.06; Cramer & Kopel, *The New Wave*, *supra* at 690-91. Since then, dozens of states have followed suit, licensing millions of law-abiding citizens to carry handguns in public for self-defense on their own initiative. *See* Lott, *Right-to-Carry*, *supra* at 1207. Public support for repealing these laws or imposing tighter restrictions, despite recent acts of mass violence involving the use of guns, and a sustained legislative push, remains weak. *See generally* Rasmussen Reports, *Gun Control*, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control (last visited Feb. 7, 2013).

This broad political consensus against sweeping gun control and in favor of self-defense rights is premised upon a view of criminal behavior that enjoys both empirical support and differs fundamentally from the assumptions underlying the New York proper cause requirement. The political consensus in the States may be summarized as follows: law-abiding citizens, those whose past actions do not

suggest future criminality, are not likely to be perpetrators, but victims, of crime. When laws are in place that forbid the keeping and bearing of arms, whether in the home or outside of it, or only in certain places, those citizens will abide by them. However, those who commit acts of violence, whether assault, robbery, burglary, rape, or murder, are unlikely to be deterred from those crimes by an additional law forbidding possessing or carrying their desired weapon or by the knowledge that the police may apprehend them in the attempt or after the fact. In such cases, the only protection for the citizen is the would-be criminal's knowledge that their would-be victim could be armed and the ability of that citizen to act effectively in self-defense. *See* Cramer & Kopel, *The New Wave*, *supra* at 686.

This view of criminal behavior is confirmed by scholarly conclusions that a jurisdiction's adoption of right-to-carry laws results in the reduction of violent crime rates. *See* Lott, *Right-to-Carry*, *supra* at 1212-16. In a seminal study of the effects of right-to-carry laws, which were then in place in only eighteen states, it was found that following adoption, "murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent." John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 23 (1997). Further studies following the effects of these laws over time indicate that rates of violent crime experience greater "drops the longer the right-to-carry laws are in effect" and "[t]he greater the percentage of

the population with permits." *See* Lott, *Right-to-Carry*, *supra* at 1212.

Sadly, the political and scholarly consensus is also confirmed by the high incidence of violence in jurisdictions that continue to impose onerous restrictions on law-abiding citizens owning or carrying firearms. Take Chicago for example, which both prohibits the possession of firearms anywhere without a permit, *see Gowder v. City of Chicago*, No. 11-C-1304, 2012 U.S. Dist. LEXIS 84359, at *3; 2012 WL 2325826, at *1 (N.D. Ill. June 19, 2012), and is located within the only State that completely bans citizens from carrying or possessing weapons almost anywhere outside their home. *See* 720 Ill. Comp. Stat. 5/24-1(4); *but see Moore*, 702 F.3d at 942. Despite all this regulation, the rate of violent crimes has been tragically high for decades and remains so. *See* Mark Konkol & Frank Main, *Chicago under fire: Murders rising despite decline in overall crime*, Chicago Sun-Times, July 7, 2012, *available at* http://www.suntimes.com/news/violence/13574486-505/chicago-under-fire-murders-rising-despite-decline-in-overall-crime.html. The suggestion that permit holders will suddenly turn to a life of wanton violence is not borne out by the data either, as demonstrated by the experience of Florida, which issued over 2 million permits from October 1, 1987 to July 31, 2011 and revoked "[o]nly 168 . . . for any type of fire-arms related violation," less than 1 percent, and those violations were mostly for "accidentally carrying concealed handguns into restricted areas." Lott, *Right-to-Carry*, *supra* at 1211.

Nor is there any academic support for the argument that permitting law-abiding citizens to carry handguns in public increases the incidence of "accidental gun deaths or suicides." Lott, *Right-to-Carry*, *supra* at 1206. In sum, New York is left with only "anecdote and supposition" to justify its substantial impairment of fundamental rights. *Playboy Entertainment*, 529 U.S. at 822. That should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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the Charleston Gazette

Morrisey vows to challenge federal gun control measures

By Eric Eyre
Staff writer

West Virginia Attorney General Patrick Morrisey said Thursday he plans to fight any new federal laws that ban assault weapons.

Congressional Democrats, led by Sen. Dianne Feinstein of California, unveiled legislation Thursday that targets 158 specific weapons in the wake of last month's school shootings in Newton, Conn.

"If a federal law is enacted that is similar to Senator Feinstein's legislation, the West Virginia Attorney General's office would actively participate in legal efforts to ensure that such law does not infringe upon the rights of West Virginians," Morrisey said in a statement. "These efforts may include a wide range of legal and educational actions."

Morrisey, a Republican who replaced longtime Attorney General Darrell McGraw on Jan. 14, has set up an "Office of Federalism" to challenge federal laws and policies that he believes have a "tenuous nexus to law or the U.S. and West Virginia constitutions."

Morrisey has hired a solicitor general — Washington, D.C., lawyer Elbert Lin — to head the new office. Lin starts work in West Virginia next month

On Thursday, Morrisey said federal restrictions on buying specific guns and rifles raises "serious constitutional concerns" under a 2008 Supreme Court ruling that struck down parts of the District of Columbia's strict gun-control law.

"When talking about an issue as important as gun control and our Second Amendment rights, it's critical that West Virginians have all the facts about the proposals being put forth," Morrisey said. "As attorney general, one of my jobs is to serve as a voice to fight crime, but I must also ensure that any actions taken by the federal government comport with both the West Virginia and United States constitutions."

Morrisey said he's also reviewing President Obama's executive actions on gun control. Obama signed 23 directives on Jan. 16.

Morissey said only four of Obama's executive measures have been implemented — and those simply require federal officials to enforce existing laws.

Morrisey questioned one of Obama's executive actions requiring the federal Centers for Disease Control to research gun violence. Morrisey said he wants more details.

"I want to make sure that the agency does not violate its statutory prohibition on using federal funding to advocate or promote gun control," said Morrisey. "We must ensure that basic research is not colored by politics, and that federal statutes are not ignored."

Morrisey also wants details about an Obama executive action that addresses mental health services. Morrisey said "new mental health care requirements on states" could violate the U.S. Constitution's spending clause.

He said West Virginia and other states shouldn't be "coerced" into funding such programs.

"Let me be clear," Morrisey said. "Addressing mental health care system deficiencies is an important priority. However, in West Virginia, we will not easily accept unfunded mandates that burden our state budget regardless of the perceived desirability of the policy goal."

Morrisey said he already has discussed proposed gun control laws and Obama's executive actions with fellow attorneys general in other states. Several senior aides in Morrisey's office also are keeping a close watch on federal assault weapons' ban proposals, he said.

"My office will continue to analyze these important issues, and discuss them with state attorneys general, so that we can properly preserve the rights of law-abiding West Virginians to own firearms," Morrisey said.

Morrisey also was asked whether he would support West Virginia schools as "gun-free zones," and whether he believes teachers and security personnel should be allowed to carry weapons on campus.

"Some individuals have proposed spending more money to address school security issues," he said. "On a personal level, I will need to be convinced about the effectiveness of any proposal that spends precious taxpayer resources before I commit to supporting it."

Morrisey said he would keep an "open mind" about any measures designed to stop mass shootings like the tragedy that claimed the lives of 20 students and six staff members at Sandy Hook Elementary School.

"In my opinion, root causes of violence are broad-based," he said. "Cultural factors, socioeconomic conditions and mental health treatment systems must all be addressed in order to make meaningful progress to reduce violence."

Reach Eric Eyre at ericeyre@wvgazette.com or 304-348-4869.

Promise 16 - Join Religious Liberty Lawsuits

Place West Virginia on religious liberty lawsuits.

Actions Taken:

✓ The Office of the Attorney General has reviewed all pending lawsuits involving states relating to the contraceptive insurance mandate imposed pursuant to the Affordable Care Act.
✓ On March 26, 2013, Attorney General Morrisey joined with twelve other state attorneys general in asking the U.S. Department of Health & Human Services (HHS) to adopt broader religious exemptions to the contraceptive insurance mandate.
✓ The public comment from Attorney General Morrisey and twelve other attorneys general questions the failure of proposed federal amendments to sufficiently address faith and conscience-based objections and for entirely ignoring the concerns of for-profit business owners who object to providing insurance coverage for FDA-approved contraceptive methods and sterilization procedures, including the "morning-after pill" and the "week-after pill" as part of the Affordable Care Act.
✓ The Attorney General's Office will be working with other attorneys general in the near future to evaluate the response from HHS to public comment, and take appropriate action to ensure that West Virginians' religious liberty rights aren't infringed upon.
✓ The Attorney General's Office will evaluate any response from HHS to the state's comments before it determines how to proceed to see whether we can avoid litigation.

State Attorneys General

A Communication from the Chief Legal Officers of the Following States:

Alabama * Colorado * Florida * Georgia * Idaho * Kansas * Montana Nebraska * Ohio * Oklahoma * South Carolina * Texas * West Virginia

March 26, 2013

BY ELECTRONIC DELIVERY AND FEDERAL EXPRESS

Secretary Kathleen Sebelius
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9968-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Dear Secretary Sebelius:

Thank you for the opportunity to comment on your proposed amendments to RIN 0938-AR42, Coverage of Certain Preventive Services under the Affordable Care Act.

The proposed regulations selectively address faith and conscience-based objections to a government mandate that requires businesses and nonprofits to pay for insurance coverage for contraception and other reproductive services. They allow a limited few religious nonprofits, such as houses of worship, to avoid the "HHS mandate" altogether. The proposed regulations purport to allow a few other religious-affiliated nonprofits, such as Catholic Charities, to avoid paying directly for these reproductive services by requiring the insurance companies that cover the organizations' employees to provide "free" coverage. The proposed regulations provide no exception to the HHS mandate for for-profit business owners who object on conscience grounds.

We believe the proposed regulations do not remedy the legal infirmities in the original HHS mandate. As you know, the Religious Freedom Restoration Act or "RFRA," 42 U.S.C. § 2000bb, requires the federal government to use the least restrictive means to accomplish a compelling governmental interest. RFRA cuts across all federal regulations and requires "strict scrutiny" of all actions of the federal government that burden the exercise of religion. We see three problems with the proposed regulations under RFRA.

First, there is no compelling reason to refuse to extend to all religious-affiliated nonprofits the exception that is available to houses of worship. RFRA requires the federal government to demonstrate that the compelling-interest test is satisfied through application of the challenged law "'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

U.S. 418, 430-31 (2006). The government must show with particularity how its interest "would be adversely affected by granting an exemption." *Id.* at 431 (internal quotations omitted). The Supreme Court has held that this test is very difficult to meet when the government allows an exception to one group or person but not to others. *Id.* This is so because allowing an exception for one group "fatally undermines" the argument that the government has a compelling interest in denying others the same or similar exception. *Id.* at 434. The proposed regulations allow an absolute exception for some religious nonprofits and deny that exception to other groups without any compelling reason for distinguishing between the two groups.

Second, the purported accommodation to allow certain nonprofits to shift costs onto insurance companies appears to be a shell game that does not alleviate the burden on the exercise of religion. We all know that insurance companies do not provide anything for free; the employers are still going to be paying for these services through increased premiums or otherwise even if the insurance company technically covers those products through a separate "free" policy. You have argued that insurers will gladly provide this coverage for free because overall health costs are purportedly reduced when an insured has access to free reproductive services. This proposition strikes us as highly unlikely. If insurers could reduce their costs by providing these services for free, then insurance companies would already be providing them for free; the entire regulation at issue would be unnecessary. The truth of the matter is that these services, like everything else, costs money. Just as they do now, insurance companies will recoup their increased costs by shifting the costs back to employers. The purported accommodation amounts to little more than an accounting gimmick.

Third, the government must provide a meaningful exception to the HHS mandate for for-profit business owners who object on conscience grounds, but the proposed regulations fail to address for-profit organizations at all. That failure is a particular problem under RFRA if one assumes that you are correct that your proposed "accommodation" for nonprofits would be costless. If you are correct that insurance companies will actually *benefit* by providing insurance coverage for free (which seems highly doubtful as explained above), then there is no compelling reason for you to limit this purported accommodation to nonprofits. Under your logic, insurers would benefit *even more* if insurance companies were required to provide insurance coverage for these services for free to the employees of all businesses, including the employees of for-profit businesses whose owners object to the HHS mandate. To be clear, we believe that the proposed cost-shifting "accommodation" does not satisfy RFRA and that appropriate religious exemptions must be provided for nonprofits and for-profits. But, even under your own logic, the proposed regulations would not be the least restrictive means of providing coverage for these services to the employees of for-profit businesses.

We fear that the HHS mandate is the first of many regulations under the Affordable Care Act that will conflict with legal protections for religious liberty and the right of conscience. We respectfully submit that RFRA requires you to adopt the broadest possible religious exceptions to the HHS mandate.

Respectfully submitted,

Luther Strange
Alabama Attorney General

John W. Suthers
Colorado Attorney General

Pam Bondi
Florida Attorney General

Samuel S. Olens
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Mike DeWine
Ohio Attorney General

Scott Pruitt
Oklahoma Attorney General

Alan Wilson
South Carolina Attorney General

Greg Abbott
Texas Attorney General

Patrick Morrisey
West Virginia Attorney General

THE WEST VIRGINIA RECORD

Morrisey, other AGs want religious exemption in Obamacare extended to businesses

March 28, 2013 10:00 AM
By John O'Brien

CHARLESTON – Thirteen state attorneys general, including West Virginia's, have asked the U.S. Department of Health and Human Services to adopt broader religious exemptions to an insurance mandate within Obamacare.

West Virginia Attorney General Patrick Morrisey announced March 27 that he joined a dozen colleagues in a letter sent to DHHS Secretary Kathleen Sebelius. The letter addresses proposed amendments to the Affordable Care Act.

More than 50 lawsuits have been filed over a mandate by HHS that required employers and insurance companies to provide coverage for all Food and Drug Administration-approved contraceptive methods and sterilization procedures, Morrisey said. Amendments proposed would allow an accommodation for certain nonprofit religious organizations to avoid paying directly for contraceptive coverage, Morrisey said, but lack a solution for for-profit business owners who object on religious or conscience grounds.

"We believe the proposed regulations do not remedy the legal infirmities in the original HHS mandate," the letter says.

"As you know, the Religious Freedom Restoration Act... requires the federal government to use the least restrictive means to accomplish a compelling government interest. RFRA cuts across all federal regulations and requires 'strict scrutiny' of all actions of the federal government that burden the exercise of religion."

Each attorney general who signed the letter is a Republican. They are Alabama's Luther Strange, Nebraska's Jon Bruning, Colorado's John Suthers, Ohio's Mike DeWine, Florida's Pam Bondi, Oklahoma's Scott Pruitt, Georgia's Sam Olens, South Carolina's Alan Wilson, Idaho's Lawrence Wasden, Texas' Greg Abbott, Kansas' Derek Schmidt and Montana's Tim Fox.

They claim there are three problems with the proposed amendments.

First, they say there is no reason to extend to all religious-affiliated nonprofits the exception that is available to houses of worship. That exception allows an absolute exception for some religious nonprofits but denies it to other groups, the AGs claim.

Second, the accommodation to allow some nonprofits to shift costs onto insurance companies "appears to be a shell game that does not alleviate the burden on the exercise of religion."

The AGs say insurance companies don't provide anything for free and that it will increase premiums.

Third, for-profit business owners who protest to the coverage on conscience grounds must be granted an exception.

"If you are correct that insurance companies will actually benefit by providing insurance coverage for free (which seems highly doubtful as explained above), then there is no compelling reason for you to limit this purported accommodation to nonprofits," the letter says.

"Under your logic, insurers would benefit even more if insurance companies were required to provide insurance coverage for these services for free to the employees of all businesses, including the employees of for-profit businesses whose owners object to the HHS mandate."

The AGs concluded that they fear the amendments will conflict with legal protections for religious liberty and the right of conscience.

"HHS's proposed amendments fail to address the deep faith-based concerns that many organizations and businesses have with the government demanding that they pay for certain types of health care services," Morrisey said.

"The proposed amendments violate the religious freedoms on which this country was built because they allow houses of worship to be exempt from a mandate, but they do not apply the same principle to nonprofit or for-profit companies with faith-based objections."

Promise 17 - Evaluate Potential Ethics Violations

After the audit referenced under number 5 is complete and all employees within the Office are interviewed, determine whether disciplinary action is warranted for any past behavior. We must ensure that all employees of the Office of Attorney General follow the rule of law and abide by the strictest ethical standards.

Actions Taken:

✓ Attorney General Morrisey is in the process of meeting with staff to examine any problematic activities that have occurred in the Office of the Attorney General, and has been cooperating with the West Virginia Legislative Auditor's Office to address past office issues as well.
✓ The Office of the Attorney General is conducting its own separate internal review, and will release any and all final conclusions after the completion of its review.
✓ The Office is currently awaiting additional findings of the audit, which will also be taken into consideration with respect to potential discipline.